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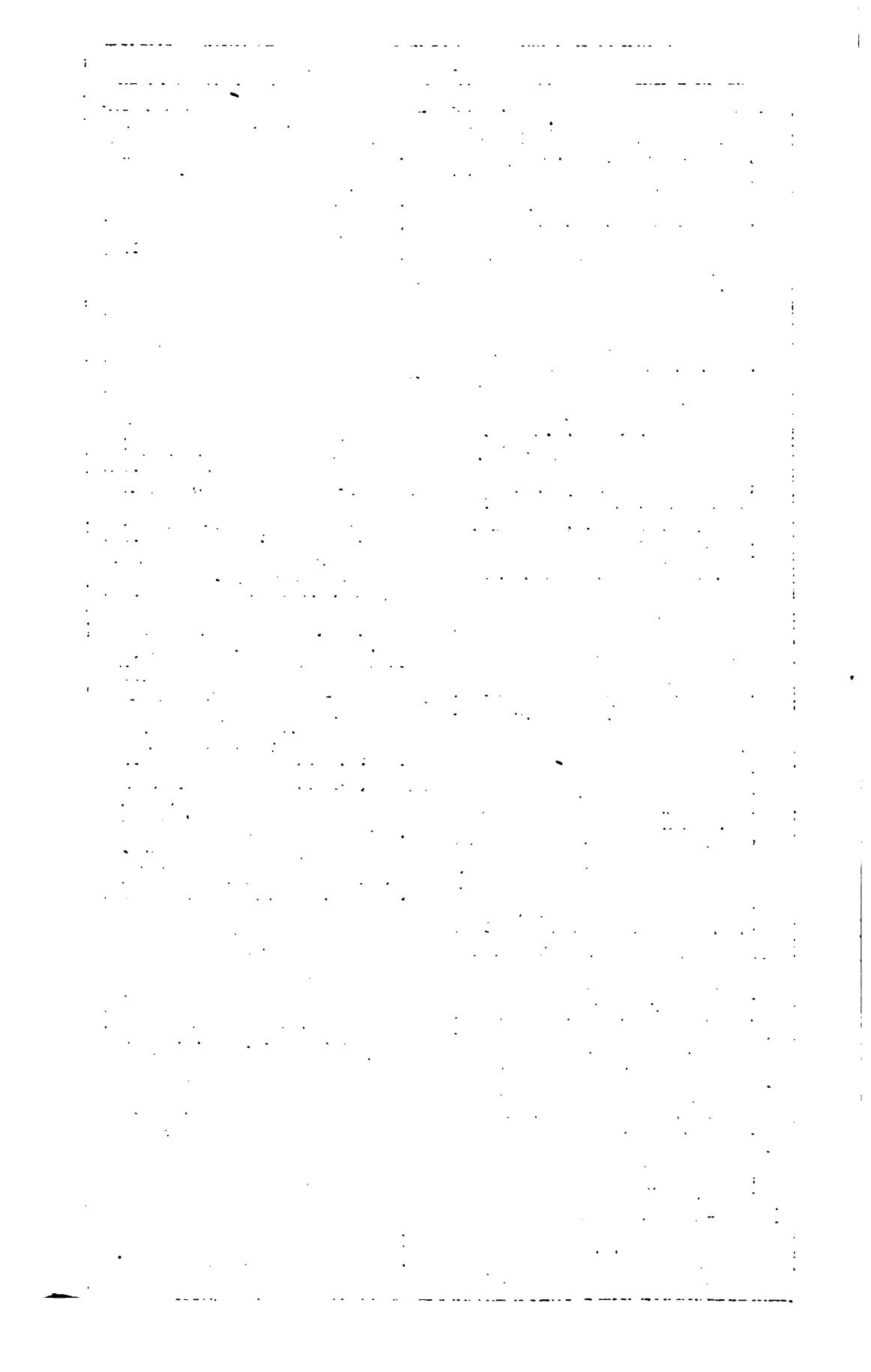
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UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

Of the Middle Temple, Barrister-at-Law.

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REPORTS OF CASES

DECIDED UNDER THE

BANKRUPTCY ACT, 1883.

IN RE DICKENSON, EX PARTE CHARRINGTON & CO.

COURT OF APPEAL.

Bankruptcy Act, 1883, sections 9 and 45, and section 168.

BEFORE THE MASTER OF THE ROLLS,
FRY, L.J.;
LOPES, L.J.
1888.

"Secured Creditor"—Order appointing Receiver of Chattels—Equitable Execution—Receiving Order against Debtor before Sale of Goods—Completion of Execution.

Where an order was obtained by a judgment creditor appointing a receiver to receive the stock-in-trade and other property and effects belonging to the judgment debtor, but without prejudice to the rights of any prior incumbrancer or of the landlord of the premises, all further questions being reserved until further order of the Court; and the receiver took possession of the goods under this order and continued in possession of them until a receiving order was made against the debtor upon which he was adjudicated bankrupt, no part of the goods having been then sold.

Held: (1) That the judgment creditor did not by reason of the order appointing the receiver become a "secured creditor" of the bankrupt within the meaning of section 9 of the Bankruptcy Act, 1883.

(2) That the order appointing the receiver was not an equitable execution, and that, even if it were, section 45 of the Bankruptcy Act, 1883, applied, and the execution not having been completed by sale before the date of the receiving order, the creditor was not entitled to retain the benefit of it as against the trustee in the bankruptcy.

THIS was an appeal on behalf of Messrs. Charrington & Co., who were judgment creditors of the debtor, against an order of Mr. Justice CAVE declaring a sum of 721*l.* to be the property of the trustee in the bankruptcy.

The debtor Dickenson carried on business as a publican at the

BANKRUPTCY REPORTS.

1888.
IN RE
DICKENSON,
EX PARTE
CHARRINGTON
& CO.

Green Dragon, Fleet Street, and also at the Bedford Head in Maiden Lane:

On November 17th, 1887, a writ was issued against the debtor by Messrs. Charrington & Co., the brewers, in respect of a debt of about £2,000*l.*, on which judgment was signed upon December 6th.

On December 7th, 1887, execution was put into both houses, and the sheriff took possession of the debtor's goods under a *fit. fa.*

On the same day application was made by the judgment creditors to a Judge of the Queen's Bench Division, under section 25, subsection (8) of the Judicature Act, 1873, for the appointment of a receiver, and on December 9th, 1887, an order was made appointing a receiver of the goods and stock in trade of the debtor in the following terms:—"It is ordered that G. C. Croft, one of the above-named plaintiffs, be appointed without security until further order to receive the stock-in-trade, utensils and implements of trade, furniture, and other property and effects belonging to the defendant, and unincumbered by any mortgage or other document or process of law at the Green Dragon public house, and also at the Bedford Head public house, but without prejudice to the rights of any prior incumbrancer or his possession (if any), or to the rights of the landlord of the said premises. And it is ordered that all further questions be reserved until further order."

The goods remained in the possession of the receiver until January 13th, 1888, when the debtor presented his own petition upon which a receiving order was made; and on January 16th he was adjudged bankrupt, and a trustee was subsequently appointed.

The goods were then sold by arrangement, the proceeds being paid to a suspense account to the name of the official receiver, and an application was made on November 5th last by the trustee to Mr. Justice CAVE for an order declaring him to be entitled to the moneys so realised (see 37 W. R. 96).

Mr. Justice CAVE allowed the application of the trustee, and from that order the judgment creditors now appealed.

Henn Collins, Q.C. (McCall with him): for Messrs. Charrington & Co.

The order appointing a receiver amounted to equitable execution. A creditor who has effected execution on goods before the presenta-

tion of a bankruptcy petition is entitled to retain the goods as against the trustee. Messrs. Charrington & Co. are in the position of secured creditors. In any case they have a lien on the goods. By section 168 of the Bankruptcy Act, 1883, a "secured creditor" means "a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." And by section 9, sub-section (2) of the Act, notwithstanding the making of a receiving order, the right is reserved to a secured creditor to realise or otherwise deal with his security. Unless there is something else in the act to cut down that position they stand as secured creditors. The only section which can do that is section 45, which provides:—
 "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of the debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." But that section so far as it refers to executions against goods, only deals with the class of executions to which seizure and sale is incident. This is an execution not capable of completion by seizure and sale. The goods are in the possession of the receiver, who has nothing to do but to keep them in his possession. (Counsel referred to *Ex parte Evans*, *In re Watkins*, L. R. 13 Ch. Div. 252; 49 L. J. Bank. 7; 41 L. T. 565; 28 W. R. 127; *In re Pope*, L. R. 17 Q. B. D. 743; 34 W. R. 693; *Salt v. Cooper*, L. R. 16 Ch. Div. 544; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553; *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275; 27 W. R. 3; *Ex parte Rocke*, *In re Hall*, L. R. 6 Ch. App. 795; 40 L. J. Bank. 70; 25 L. T. 287; 19 W. R. 1129; *Ex parte Williams*, *In re Davies*, L. R. 7 Ch. App. 314; 41 L. J. Bank. 38; 26 L. T. 803; 20 W. R. 430; *Ex parte Abbott*,

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 were not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment. I am of opinion, notwithstanding the arguments which have been pressed upon us on behalf of the appellants in this case, that we must agree with the decision of Mr. Justice CAVE. Mr. Henn Collins has first argued the matter on section 9 of the Bankruptcy Act, 1883, and he admits that unless he brings himself within sub-section (2) of that section the title of the trustee to these goods must have priority. But he says that he is brought within sub-section (2) of section 9 and is a secured creditor, and the matter by which he is so brought within the section is the order appointing a receiver. Now look at the form of the order. The order was made appointing a receiver of the goods and stock in trade of the debtor. Does that make the appellants secured creditors and so bring them within sub-section (2)? We must see what a secured creditor is and section 168 says that a secured creditor "means"—it does not say "includes"—"a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." It is not pretended here that there is a mortgage or a charge, but it is said that there is a lien, that is to say that the creditors hold a lien by means of the possession of the receiver appointed under this order. How can the possession of this receiver make out a lien of the creditors? Does the receiver hold the goods so as to give the creditors possession of them as an agent for the creditors? That cannot be. He is a receiver appointed by the Court in order that the Court may deal subsequently with the matter. He holds as agent for the Court; he does not hold for the creditors at all. If the case stood upon section 9, sub-section (2), therefore it does not come within the section at all, because it is not made out that the creditors are secured creditors.

But Mr. Henn Collins has elaborately argued that the delivery to the receiver under the order was a delivery in execution and that

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that makes the creditors secured creditors. Now in the first place where it is a delivery to be followed up by nothing done in favour of the creditors how can that be delivery in execution? If there never can be a realisation under the order how can it be delivery in execution? It was suggested that it might be followed up by an order of the Court for a sale of the goods, but it was practically admitted that such an order is rarely if ever made. Even if there can be a realisation the case comes within section 45 of the Act because by that section a creditor is not entitled to retain the benefit of an execution against goods as against the trustee in bankruptcy unless he has completed the execution by seizure and sale. Here there has been no sale and therefore no completed execution. My own impression is that this order for a receiver is not an execution at all, and the case is not brought within section 9, subsection (2). But if it can be said to be a seizure in execution it is met by section 45 and here there was no sale. I put it distinctly as my opinion, however, that where such an order as this is made with regard to goods that does not make the creditor who obtains it a secured creditor.

FRY, L.J.:

Before the Judicature Act the Court of Chancery used to aid execution at law where execution was levied against land, by appointing a receiver of the rents and profits of the land. This was called equitable execution. By the Judicature Act a receiver may now be appointed in any case where it appears to the Court to be just or convenient. But an order like this appointing a receiver of goods does not appear to be equitable execution at all. It simply orders him to hold chattels. But the question is whether under section 9 of the Bankruptcy Act, 1888, the judgment creditor has derived any benefit from this order. A secured creditor is a person who has obtained a mortgage, charge or lien on the property of the debtor. This order creates no mortgage: it creates no charge; and it is plain to me that there is no lien. Such a receiver has no lien that I am aware of. It is a simple order to retain goods. Further section 45 of the Act materially concerns this case. A creditor shall not be entitled to retain the benefit of an execution as against the trustee in bankruptcy unless he has com-

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1858. pleted such execution. I cannot understand how this is an execu-
IN RE tation at all, but if it be an equitable execution it has not been
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LOPES, L.J.:

I entirely agree. I have nothing to add.

Appeal dismissed.

Solicitors : *Loxley & Morley*, for Messrs. Charrington & Co.
Nash, Field & Withers, for the trustee in bank-
ruptcy.



PRACTICE.

IN RE STOVOLD, EX PARTE THE BOARD OF TRADE.

BEFORE
MR. JUSTICE
CAVE.
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Bankruptcy Act 1883, section 21.

*Notification to Court by Board of Trade of objection to appointment of trustee—
Grounds of objection—Difficulty of acting with impartiality in the interest of
the creditors generally—Costs.*

Where objection is taken by the Board of Trade under section 21 of the Bankruptcy Act, 1883, to a trustee appointed by the creditors on the ground that "his connection with or relation to the estate of the bankrupt makes it difficult for him to act with impartiality in the interest of the creditors generally," and it is alleged that the person so appointed has dealt with the estate of the bankrupt with notice of an available act of bankruptcy and that he is accountable to the trustee in the bankruptcy in respect of his dealings with the estate, it is not essential that the Board of Trade should establish any absolute act of bankruptcy or personal liability of such person to the estate, but it is sufficient to shew that there is a necessity to have an account taken which may or may not disclose personal liability.

And it would seem that it is not requisite on the Board of Trade to take such account and judge of the liability, but that it is for the trustee to take it in the bankruptcy.

Where shortly before the bankruptcy an accountant at the request of the principal creditor of the debtor took possession of the debtor's estate for the purpose of controlling his receipts and expenditure, the account subsequently rendered in respect of such dealings with the estate shewing a balance of 26*l.* which the accountant claimed to retain as charges which he might properly make against the bankrupt.

Held: That the Board of Trade was justified in objecting to the appointment by the creditors of such accountant as trustee in the bankruptcy: and that the objection must be sustained.

THIS was a Notification to the Court by the Board of Trade under section 21 of the Bankruptcy Act, 1883, of their objection to the appointment of one *A. L. Blow*, an accountant, as trustee of the property of the bankrupt *A. C. Stovold*, upon the grounds that his connection with or relation to the estate of the bankrupt rendered it difficult for him to act with impartiality in the interest of the creditors generally, as stated in the Report following:—

"1. On September 28th, 1888, a petition in this bankruptcy was

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presented to the County Court of Kent holden at Tunbridge Wells by the debtor, Arthur Charles Stovold, and a receiving order was made thereon on the same day.

2. On October 17th, 1888, the first meeting of the creditors of the said debtor was duly held, and at such meeting it was resolved that the said debtor should be adjudged a bankrupt and that Alfred Lister Blow, of 2 King Street, Cheapside, accountant, a member of the firm of Messrs. Jossolyne Miles & Blow of that address, should be appointed to fill the office of trustee of the property of the bankrupt with a committee of inspection.

3. The debtor was on October 19th, 1888, duly adjudged a bankrupt accordingly, and on October 18th, 1888, the said appointment by the creditors of the said Alfred Lister Blow to fill the office of trustee was reported to the Board of Trade.

4. The facts mentioned in the next succeeding paragraphs numbered 5 to 20 have been reported to or brought under the notice of the Board of Trade with reference to the connection with and relation to the said bankrupt or his estate and the creditors of the said Alfred Lister Blow.

5. The bankrupt was at the commencement of the bankruptcy a tailor carrying on business in Tunbridge Wells aforesaid.

6. On or about August 20th, 1888, he became aware that he was insolvent and not able to continue to carry on the said business.

7. During the following fortnight the said Alfred Lister Blow, acting on the instructions of Messrs. Howes, the principal creditors of the bankrupt, removed or caused to be removed the whole of the books of the said bankrupt and caused a statement of his affairs to be prepared, and a private meeting of the creditors of the said Arthur Charles Stovold was subsequently summoned.

8. The said meeting took place on September 3rd, 1888, at the office of the said Alfred Lister Blow.

9. The said meeting was attended by about 8 of the creditors of the said bankrupt and by the bankrupt.

10. The bankrupt was at the meeting asked by the said Alfred Lister Blow whether he had any proposition to make to his creditors for a settlement of his affairs, and the said bankrupt thereupon informed the said Alfred Lister Blow in effect that he had no pro-

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posal whatever to make other than that he was prepared to execute an assignment for the benefit of his creditors.

11. The bankrupt also informed the creditors at the said meeting that he was going out of business.

12. The bankrupt at the said meeting executed a document which he states he considered and intended to be an assignment of all his property for the benefit of his creditors, and the said bankrupt stated that he understood that he was to act, and from and after that date he acted as the servant of the said Alfred Lister Blow at a salary of 4*l.* a week.

13. The document so executed by the bankrupt at the said meeting was in the words and figures following:—

GENTLEMEN,

3rd September, 1888.

I hereby authorise you forthwith to enter and take possession of the premises at Kentish Corner, Tunbridge Wells, now in my occupation, and the furniture, stock-in-trade, and effects therein, and to retain such possession pending the execution by me of an assignment of my effects to a trustee for the benefit of my creditors, which I undertake to do if and when required by you. And I also authorise you in the meantime to carry on the business and to receive all cash and pay all outgoings on my behalf.

Yours truly,

ARTHUR C. STOVOLD.

Messrs. JOSSOLYNE MILES & BLOW.

The said document was read to the bankrupt at the meeting and the creditors present assented to it.

14. Immediately after the execution of the said document by the bankrupt the said Alfred Lister Blow or his firm sent a person named Mr. Falkner down to take possession of and control the said business, and possession of his business and premises was taken by the said Mr. Falkner on behalf of the said Alfred Lister Blow, and thenceforward down to the date of his withdrawal hereinafter mentioned the said business was carried on by or on behalf of the said Alfred Lister Blow, and all goods and monies in the said business were received and retained by him or on his behalf. The bankrupt states that he took his orders entirely from the said Mr. Falkner, who paid him (the bankrupt) wages at the rate of 4*l.* per week. The said Mr. Falkner received all cash and gave all orders in the said premises.

15. About two days before the bankrupt filed his petition a document purporting to be a statement of account with at the end of it

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the words and figures hereunder mentioned was brought to the bankrupt at the said place of business. Such document purported to bear date September 26th, 1888 ; it was brought to the bankrupt on behalf of the said Alfred Lister Blow or his firm, and the bankrupt was required to sign it. The words at the end of the said account were :—

I approve of the above account and authorise Messrs. Jossolyne Miles & Blow to retain the balance of 26*l.* 13*s.* 2*d.* on account of their charges.

September 26th, 1888.

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16. The bankrupt signed the said document, but he has deposed that its contents were not explained to him, and that he did not know that by signing the said certificate he was authorising the said firm of Messrs. Jossolyne Miles and Blow to keep for themselves the balance of receipts of the working of the business, but thought that as the creditors were employing the said Alfred Lister Blow the said balance would go to his estate and be divisible amongst his creditors.

17. The said Alfred Lister Blow or his firm purporting to act in virtue of the document thus signed by the bankrupt has retained and claims to retain the said sum of 26*l.* 13*s.* 2*d.*, being proceeds of the bankrupt's estate and effects received by the said Alfred Lister Blow or his firm. Neither the said Alfred Lister Blow nor his firm have ever rendered any account of how or on whose instructions their charges in respect of which they claim to retain such sum were incurred or the amounts or items of such charges, nor has the said Alfred Lister Blow ever offered to account to the creditors or to the official receiver (the existing trustee in the bankruptcy) for the said sum.

18. Immediately after the signature of the said document by the bankrupt he was required by the said Alfred Lister Blow to go to London to see him, which the bankrupt did, and according to the deposition of the bankrupt before the Court the said Alfred Lister Blow thereupon told him in effect that he must file a petition in bankruptcy, upon which the bankrupt and the said Alfred Lister Blow then went together to a solicitor, who in the presence of the said Alfred Lister Blow stated that he should require a sum of

about 10*l.* to take up the bankrupt's case, and desired the bankrupt to come again with the 10*l.*

19. The bankrupt states that he thereupon went back to the said place of business and obtained from the said Mr. Falkner or was authorised by the said Mr. Falkner to take out of the receipts of the business a sum of about 10*l.*, which the bankrupt then took up to the said solicitor.

20. The bankrupt's petition was filed on September 28th, 1888, and thereupon or about that time the said Alfred Lister Blow withdrew the said Mr. Falkner from possession and control of the business.

21. Upon the election of the said Alfred Lister Blow as trustee in the bankruptcy being reported to the Board of Trade, the Board caused a letter to be addressed to him dated October 20th, 1888, informing him that his appointment appeared to the Board of Trade to be open to objection, and requesting him if the considerations to which his attention had been drawn did not disqualify him for the appointment to furnish to the Board of Trade any observations which he might wish to make in the matter in order that they might be placed before the Board of Trade.

22. On or about October 23rd, 1888, the Board of Trade received from the said Alfred Lister Blow a reply to the said letter of October 20th, 1888, declining to withdraw from the trusteeship.

23. On or about the 20th the bankrupt was examined before the Court in which the bankruptcy is proceeding (the County Court at Tunbridge) and a considerable part of such examination relates to the dealings of the said Alfred Lister Blow and his firm with the bankrupt's estate and effects.

25. In the opinion of the Board of Trade, who at present are exercising the functions of committee of inspection of the bankrupt's estate, it will be desirable to apply to the said Court to examine the said Alfred Lister Blow with reference to his said dealings with the bankrupt's estate and effects, and specially with reference to the retention by him or his firm of the said sum of 26*l.* 13*s.* 2*d.* out of the receipts of the said business and the application of the said sum of 10*l.* or thereabouts out of such receipts towards the payment of the costs of the bankrupt's petition.

26. In the opinion of the Board of Trade one of the duties of the trustee in this bankruptcy will be to inquire into the whole of the

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dealings of the said Alfred Lister Blow with the bankrupt's estate and to enforce the rendering and audit of a full account of such dealings and of payment over of all monies due from the said Alfred Lister Blow under such account. The Board of Trade are of opinion, upon the construction of section 21, sub-section (2) of the Bankruptcy Act, 1883, that where the person appointed by the creditors to fill the office of trustee of the property of the bankrupt is or where there is reasonable grounds for believing that he may on investigation be found to be a person who whether individually or as a member of a firm has improperly dealt with the estate of the bankrupt or who in like manner has dealt with the estate of the bankrupt with notice of an available act of bankruptcy, and where there is reasonable ground for believing that such person is or may on investigation be found to be in either of such capacities as aforesaid accountable to the trustee in the bankruptcy in respect of such dealings, and where it would therefore be the duty of the trustee to conduct such investigation, the connection of such person with and his relation to the estate of the bankrupt make it difficult for him to act with impartiality in the interests of the creditors generally.

The Board of Trade are further of opinion as regards this matter that there is reasonable ground for believing

- (a) That the said Alfred Lister Blow or his said firm has dealt with the estate of the bankrupt with notice of an available act of bankruptcy.
- (b) That the said Alfred Lister Blow or his said firm is accountable to the trustee in the bankruptcy for his or their said dealings with the estate of the bankrupt.
- (c) That the said Alfred Lister Blow or his said firm has in his or their hands monies forming part of the property of the bankrupt.
- (d) That the said Alfred Lister Blow or his firm has dealt improperly with the estate of the said bankrupt.

The Board of Trade further are of opinion that it is essential in the interests of the estate that these matters should be fully and properly inquired into, and that that can be done only by an investigation to be instituted by an independent and impartial trustee."

An affidavit in answer to the Report of the Board of Trade was filed by the trustee in which he stated that about August 17th, 1888, he was instructed by Mr. *Hadfield*, of the firm of *Howes Mead & Sons*, to inspect the books of the debtor and report thereon for the information of the creditors and generally to watch the interests of the creditors in the matter, and that in carrying out those instructions the meeting of September 3rd was held and Mr. *Falkner* sent down to Tunbridge Wells as alleged: that the debtor did not inform the said meeting that he was going out of business, and that the document then signed by the debtor was fully explained to the debtor and it was clearly understood by all parties not to be intended to be an assignment for the benefit of creditors but simply a preliminary step to enable the firm of which the trustee was a member, as is the custom in the woollen trade in such cases, to act with the debtor for the protection of the interests of all parties pending the assignment, and keep the debtor going in his business in order that such business might be disposed of as a going concern: that the debtor was never informed that he was to act as a servant at a salary, and that no salary was ever paid to him: that all the cash received and paid by *Falkner* was entered in an account book kept for that purpose which the debtor saw whenever he required, and which he from time to time signed as approving the accuracy thereof, and that when the debtor signed the document of September 26th, 1888, he quite understood that he was signing an account the particulars of which were already entered in the account book; and that when authorising the trustee's firm to retain the sum of 26*l.* 18*s.* 2*d.* balance of the said account he knew the firm had incurred charges and disbursements in relation to the matter equal to or exceeding that sum as to which they were ready to render an account; and that at the time of the said application of the said balance neither the trustee nor his firm had notice of any available act of bankruptcy committed by the debtor.

Sir Edward Clarke, Q.C., Solicitor General (Muir Mackenzie with him): for the Board of Trade.

The objection to the appointment of Mr. *Blow* as trustee is that his connection with the estate of the bankrupt makes it difficult for

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him to act with impartiality in the interest of the general body of the creditors. The trustee appointed ought to call on *Blow* to account for his dealings with the moneys and his charge of 26*l*. This case comes within the principle laid down by your Lordship in the case of *In re Martin, Ex parte The Board of Trade* (see *ante*, Vol. V. p. 129). *Blow* has been dealing with the property and the trustee appointed in the bankruptcy ought to call on him to account.

Herbert Reed: for the trustee.

Each case of this kind must depend on its own particular facts. At the meeting on September 3rd one of the creditors required an explanation of the statement which had been drawn up and so it was impossible to make an assignment to Mr. *Blow* for the creditors. In order to keep things going while it was being determined whether there should be an assignment or a bankruptcy the creditors asked *Blow*, who would be the trustee under the assignment if it was executed, to look after matters for them. That is all that was done. Mr. *Blow* did not take possession of the business. The business was the debtor's and it was in the power of the debtor to permit or not to permit any particular thing to be done. The business was the debtor's and it was carried on for his benefit in order that things might be kept going until bankruptcy or the assignment might be determined on. In the case of *In re Martin, Ex parte The Board of Trade* (see *ante*, Vol. V., p. 129) the trustee under the deed and who had intermeddled was appointed trustee in the bankruptcy. Here there was no assignment. If the objection of the Board of Trade is upheld there must be a new meeting and somebody who knows nothing about the estate must be appointed. Meanwhile in all probability the business will be ruined. The dealings with the estate here were with the full knowledge of the creditors and are accounted for to their satisfaction and Mr. *Blow* is quite prepared to have them examined into. When a body of business creditors choose to elect a fully competent person as their trustee, it does seem a pity if such an objection as this can be sustained. It is not a case within the spirit of the section. It is not difficult for this trustee to act with impartiality. The request to the Board of Trade to notify their objection to the Court in this case was

signed by creditors to the amount of 1172*l.* 15*s.* 7*d.* out of a total of 1580*l.* 19*s.* 2*d.*

CAVE, J.:

I am of opinion that the objection of the Board of Trade in this case must be sustained. The question arises under section 21, sub-section (2) of the Act, and that says, "The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally." Now it is not alleged here that the appointment was not made in good faith by a majority in value of the creditors voting; nor is it alleged that Mr. Blow is not a person fit to act as a trustee speaking generally, without regard to his relation to this particular estate; but what is alleged is that his connection with or relation to the bankrupt, or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interest of the creditors generally; Not that it makes him act unjustly, but that it makes it "difficult for him to act with impartiality in the interest of the creditors generally."

Now what is the position in which Mr. Blow stands with reference to the estate of this bankrupt? In September of last year he is requested by Mr. Hadfield to take charge of the bankrupt's estate, and control his receipts and his expenditure. He does so, and in doing so he receives a sum of between 80*l.* and 90*l.* He expends out of that a sum of between 50*l.* and 60*l.* and there is a balance of 26*l.* or 27*l.* which he claims as charges which he may properly make against the bankrupt.

Now therefore he is a person who is bound to account to the estate, and Mr. Blow has to bring Mr. Blow to account. Secondly, the nature of this account and the principle upon which it is to be taxed, must depend very much indeed upon whether there was or was not an act of bankruptcy before September 4th, and Mr. Blow

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would have to start by deciding that. He may decide in his favour, and it would be in his favour that there was no act of bankruptcy, or he may decide against himself that there was an act of bankruptcy, but it is difficult for him to decide that question impartially, because there would be a strong inclination to decide in his own favour. So again when he comes to tax his own bill, and decide whether his own charges are, or are not, fit and proper charges to make, it is almost impossible to see how he can do that with impartiality. Now, if I look at what he has put forward in his affidavit, what he says is that the debtor assented to everything that has been done, and that he understood everything and knowingly signed the document by which he assented to Mr. Blow receiving the 26*l.* odd. But that is the very thing which Mr. Blow in that position is likely to do ; he is likely to treat the assent of Mr. Stovold as being under the circumstances conclusive in the matter, and that is what a man ought not to do as trustee under those circumstances. Knowing the position in which a debtor is he ought very strenuously to examine into everything he has done. He is dealing with an accountant who has been sent down by his principal trade creditor, and is it to be supposed that what he says or does with regard to that trade creditor is so satisfactory that it will relieve the accountant from any liability to account beyond the account which he has already rendered. Obviously not so.

Then again there is another part of the affidavit in which Mr. Blow says he is prepared to submit to any examination with regard to his dealings, and he is prepared to submit his charges and the whole of his dealings with the estate to the Court or the Board of Trade or the Committee of Inspection. That is not what was intended. It was intended that the dealings of any person who has dealt with the bankrupt should be submitted to the impartial determination of the trustee, who has to act fairly and with impartiality at the same time with a due regard to the interests of the creditors. It seems to me it is quite impossible for Mr. Blow to fulfil that. He has to determine whether there has been an act of bankruptcy or not, and that may make a very great difference with regard to the principle upon which those charges should be allowed. Then he has to go through the account and ascertain whether everything is put down that has been received, or what has been

received. He has also to deal with the other side and see that every payment is a payment that has been properly made, and then finally he has to see that those charges which Mr. Blow makes of 26*l.* odd are fair and proper charges. How can a man do that impartially? I do not say it is absolutely impossible for a man to do it, but the fact of its being very difficult for him to do it is why, according to the Act of Parliament Mr. Blow should not do it. I am therefore of opinion that I must sustain the objection.

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Sir Edward Clarke, Q.C.:

I ask for costs against Mr. *Blow*. He refused to withdraw from the trusteeship and forced on the notification. It was *Blow's* action all the way through. The expense has been caused by him and he ought to pay the costs.

Herbert Reed:

A person who is chosen trustee by the creditors and appears under Rule 299 of the Bankruptcy Rules, 1886, by which the creditors request the Board of Trade to notify their objection to the Court is not in the position of a litigant. There is moreover a general charge of having dealt improperly with the estate against Mr. *Blow* in the report.

Cave, J.:

I think Mr. *Blow* must pay these costs. It is quite clear to my mind that he determined to fight this question as a matter of principle, and one can see it might be a matter of considerable importance to him, because if I had not allowed this objection I should have sanctioned the principle that any creditor might send down a member of the firm he usually employs as his accountant to carry on the business for a certain period and make him an accounting party to the estate, and then after that he might act as trustee. That would be an extremely objectionable course to my mind and I think that Mr. *Blow* under the circumstances ought to pay the costs.

Objection sustained with costs.

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IN RE
STOVOLD,
EX PARTE
THE BOARD
OF TRADE.

Solicitors: *The Solicitor to the Board of Trade*, for the Board of Trade.

Lindsay, Mason & Co., for the trustee.

Case relied upon:—

In re Martin, Ex parte The Board of Trade, see *ante*, Vol. V., p. 129; L. R. 21 Q. B. D. 29; 57 L. J. Q. B. 384; 58 L. T. 889; 36 W. R. 698.

BEFORE
MR. JUSTICE
CAVE.
1889.
—
January 15th.

IN RE LUSTY, EX PARTE LUSTY.

Bill of Sale—Equitable Mortgage of Leaseholds—Trade Machinery—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), sections 4 and 5.

On August 29th 1887 certain leasehold premises together with the fixed machinery and effects in and upon the said premises, were purchased by the bankrupt out of moneys provided by the applicant upon the understanding and agreement that he should hold the said property, plant, machinery and effects as trustee for and on behalf of the applicant until such time as he should require an assignment of the same.

On February 7th 1888 the bankrupt deposited with the applicant the deeds and documents of title relating to the said property together with a memorandum whereby after reciting the terms of the purchase he undertook upon demand to execute in favour of the applicant an assignment of the property either by way of mortgage for securing the repayment of the money advanced, or absolutely, as the applicant should elect; and until such election was exercised he deposited with the applicant the lease and documents of title relating to the property as an equitable mortgage.

In July 1888 a receiving order was made against the bankrupt and the plant, machinery, and effects upon the premises were subsequently claimed by the official receiver on the ground that the memorandum was an assignment of trade machinery and required to be registered as a bill of sale.

Held: That the document in question was not an assignment of the trade machinery and was not a bill of sale within the meaning of the Acts; and that the mortgagee was entitled to the property claimed.

THIS was an application on behalf of *John Lusty*, a nephew of the bankrupt, for an order declaring that certain plant, machinery

and effects on the Gill Saw Mills, Spencer Street, Limehouse, belonged to him as mortgagee of the leasehold premises.

On August 29th, 1887, the bankrupt *William Lusty* purchased from Mr. *Harding* the chief official receiver in Bankruptcy certain leasehold premises situate in Spencer Street, Rhodeswell Road, in the parish of St. Ann Limehouse, comprised in and demised by an indenture of lease dated June 19th, 1879, and made between *William Gill* of the one part and *George Frederick Gill* on the other part, together with the fixed machinery and effects in and upon the said premises for the price or sum of 400*l.*

This sum of 400*l.* was provided by *John Lusty*, the present applicant, and the sale was made to *William Lusty* upon the understanding and agreement that *William Lusty* should hold the said property, plant, machinery and effects, as trustee for and on behalf of the applicant until such time as he should require an assignment of the same.

On February 7th, 1888, *William Lusty* deposited with *John Lusty* the deeds and documents of title relating to the leasehold property together with a memorandum duly signed by him and attested, as follows:—

"To Mr. JOHN LUSTY, 26 Stainsby Road, Poplar, E.—I hereby admit and acknowledge that the purchase made by me by an indenture dated August 29th, 1887, and made between Nicholl Morgan of the first part, R. P. Harding of the second part, and myself of the third part, of the lease dated June 29th, 1879, in favour of one William Gill of certain property situate at the end of Spencer Street, Rhodeswell Road, St. Ann, Limehouse, in the county of Middlesex, together with the Saw Mills thereon, machinery and effects, was made out of moneys provided for that purpose by John Lusty of 26 Stainsby Road, Poplar, and upon the understanding and agreement that I should hold such lease and effects as trustee for and on his behalf until such time as he should require an assignment of the same, and I hereby undertake upon demand to execute in his favour an assignment of the before-mentioned property, either by way of mortgage for securing the repayment by me to him of the sum so provided by him as aforesaid and any other sums he may have advanced to me, or absolutely as he shall elect, and until such election is exercised I have depo-

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sited with him the lease and documents of title relating to the property as an equitable mortgage.

"Dated this 7th day of February, 1888.

"WILLIAM LUSTY."

Witness,

ALBERT MYERS,

Solicitor, 3 South Square, Gray's Inn.

In July, 1888, a receiving order was made against *William Lusty* and the plant, machinery and effects in and upon the said premises were claimed and advertised for sale by the official receiver, but on August 3rd, 1888, an order was made by Mr. Justice MANISTY, sitting for the Bankruptcy Judge in chambers, directing the official receiver to withdraw from possession of lots 44 to 75 and lot 101 in the sale catalogue which comprised the property in question claimed by the applicant, on the applicant undertaking to be answerable for the value thereof on the hearing of the motion to declare the title.

That motion was now made by *John Lusty*.

Beddall: for *John Lusty*.

The applicant claims these articles which are attached and affixed to the premises. I admit that as between landlord and tenant these would be tenant's fixtures since they could be removed with little difficulty, but as an equitable mortgagee I can claim them. They consist of circular saws, benches, &c.: But the real objection taken against me is that the memorandum of deposit ought to have been registered as a bill of sale as an assignment of trade machinery. But in the case of *In re Yates, Batcheldor v. Yates* (L. R. 38 Ch. Div. 112; 57 L. J. Ch. 697; 59 L. T. 47; 86 W. R. 563), "The owner of land and buildings which he used for the purposes of his business and in which there was fixed machinery belonging to him being 'trade machinery' within the meaning of the Bills of Sale Act, 1878, mortgaged them in fee without any general words or any reference to fixtures or machinery. By the mortgage deed it was agreed that the powers in section 19 of the Conveyancing and Law of Property Act, 1881, should be exercisable without such notice as required by the Act. After the

death of the mortgagor his creditors insisted that this mortgage was void both as to the freehold and as to the trade machinery under the Bills of Sale Acts, 1878 and 1882. The Vice-Chancellor of the County Palatine held it valid as to both. On appeal the argument that it was void as to the freehold was abandoned on the authority of *In re Burdett, Ex parte Byrne* (see *ante*, Vol. V., p. 32), and it was held that the mortgage was not an assignment of the trade machinery since the trade machinery only passed by virtue of being affixed to the freehold and that the deed did not, apart from the power of sale, give a power to seize or take possession of the trade machinery as chattels since the mortgagee could only take possession of them by taking possession of the freehold : held also that the power of sale did not authorise the mortgagee to sell the trade machinery apart from the freehold : held, therefore, that the instrument was not a bill of sale within the meaning of the Acts and gave a valid security on the trade machinery." Here even admitting that if it were an assignment of trade machinery it would be a bill of sale, this was an equitable mortgage of realty and there happens to be included in that trade machinery. (Counsel also referred to *Menx v. Jacobs*, L. R. 7 H. L. 481 ; 44 L. J. Ch. 481 ; 32 L. T. 171 ; 23 W. R. 526 : *Ex parte Barclay*, 5 De G. M. & G. 403 : *Horn v. Baker*, 2 Smith's Lead. Cas. 236 ; 9 East, 215.)

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Muir Mackenzie: for the Official Receiver.

The Bills of Sale Act, 1878, provides that a bill of sale shall include "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in Equity to any personal chattels, or to any charge or security thereon, shall be conferred." And by section 5 "trade machinery shall, for the purposes of this Act, be deemed to be personal chattels." An instrument by which a right in Equity is given to any machinery is a bill of sale. This is such an instrument. The document undertakes to make an assignment not only of the lease but of the things as well. The instrument gives a right in Equity to the saw mills and trade machinery and is a bill of sale. The case of *In re Yates, Batcheldor v. Yates* (L. R. 38 Ch. Div. 112 ; 57 L. J. Ch. 697 ; 59 L. T. 47 ; 36 W. R. 563) is distinguishable, because there the mortgage was a mortgage of realty only, and

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there was no mortgage of trade machinery. (Counsel also referred to Amos & Ferrard on Fixtures, 3rd Ed., pp. 284, 285.)

CAVE, J.:

Judgment.

I am of opinion in this case that Mr. Beddall has made out his point. I do not see how an answer can be made to it when we compare this document with the decision in *Batcheldor v. Yates* (L. R. 38 Ch. Div. 112). The Court of Appeal there came to the conclusion that the assignment of trade machinery struck at must be an express assignment and that an assignment of something else which by virtue of the law carries with it trade machinery does not fall within the Act of 1878. I am bound by that decision, and the only question is whether this case falls within that principle. This document is one by which the bankrupt agrees to execute a mortgage security or absolute assignment to the claimant at his option and it goes on, "and until such election is exercised I have deposited with him the lease and documents of title relating to the property as an equitable mortgage." So far as the document purports to give John Lusty a right to have the trade machinery separately assigned to him it comes within the Bills of Sale Act 1878, and within what was laid down in *Batcheldor v. Yates* (L. R. 38 Ch. Div. 112). But then come the words "until such election is exercised I have deposited with him the lease and documents of title relating to the property as an equitable mortgage." Now it seems to me that that gave to John Lusty all the rights which he could have by an equitable deposit of the title deeds of the lease and that according to the decision in *Batcheldor v. Yates* (L. R. 38 Ch. Div. 112) gives to him the trade machinery because there is no express assignment of the trade machinery and nothing which can be registered under the Bills of Sale Act 1878. There is here a peculiar security until the assignment is executed and then a different security is to be made. The intention of the parties was that at a future time when the election had been expressed John Lusty should have something going beyond the equitable mortgage of the leasehold and until that he should have nothing but the equitable mortgage of the leasehold. Until the election John Lusty had nothing but an equitable mortgage by deposit although he might demand something further, and so long as the equitable

mortgage lasted by the case of *Batcheldor v. Yates* (L. R. 38 Ch. Div. 112) he does get a real though modified right to the trade machinery. If he had exercised his election so that the equitable mortgage had come to an end and the other thing had been substituted for it he would have had greater rights over the trade machinery but unless it had been registered it would have been avoided by the requirements of the Bills of Sale Act. Until that he had an equitable mortgage only and according to the decision in *Batcheldor v. Yates* (L. R. 38 Ch. Div. 112) he had a right to the trade machinery which was not founded on express assignment and which did not require to be registered as a bill of sale. For these reasons I am of opinion that the motion must be allowed.

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Application allowed.

Solicitors : *A. Myers*, for John Lusty.

W. W. Aldridge, for the official receiver.

Cases relied upon or referred to :—

In re Yates, Batcheldor v. Yates, L. R. 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; 36 W. R. 563.

In re Burdett, Ex parte Byrne, see *ante*, Vol. V., p. 32; L. R. 20 Q. B. D. 810; 57 L. J. Q. B. 263; 58 L. T. 710; 36 W. R. 345.

Meux v. Jacobs, L. R. 7 H. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 23 W. R. 526.

Ex parte Barclay, 5 De G. M. & G. 408.

Horn v. Baker, 2 Smith's Lead. Cas. 236; 9 East, 215.



BEFORE
MR. JUSTICE
CAVE.
1889.

IN RE JAMIESON, EX PARTE PANNELL.

Bankruptcy Act, 1883, section 54.

January 16th. Married Woman—Separate Property—Bankruptcy of Husband—Claim of Trustee in Husband's Bankruptcy to Furniture purchased by Wife—Claim of Trustee to Wedding Presents.

Wedding presents given to a woman on occasion of her marriage are her separate property, and in the event of the subsequent bankruptcy of the husband they cannot be claimed by his trustee.

Prior to the marriage in 1882 an antenuptial settlement was executed by which it was agreed that if at any time during the intended coverture the wife, or the husband in her right should "by gift, will, settlement, succession, transmission, or otherwise" become beneficially entitled to any personal estate "except plate, trinkets, furniture and jewels" which were to be considered as property settled to the separate use of the wife, such property should come into settlement.

Held: That the covenant in question included gifts to the wife before the marriage, and was also sufficient to cover the gifts given to her on her marriage; and that the words were not confined so as to apply only to property which might be acquired by the modes mentioned at some future time.

THIS was an application on behalf of the trustee in the bankruptcy for an order against Mrs. Jamieson, the wife of the bankrupt, declaring that certain furniture purchased from Messrs. *Hampton & Co.* was the property of the trustee; and for a further order that the presents given to Mrs. Jamieson before or on occasion of her marriage also belonged to him.

On June 26th, 1882, prior to the marriage, an antenuptial settlement was executed by which Mrs. Jamieson became entitled to 1000*l.* a year for her separate use.

This settlement contained a covenant by which it was agreed that "if at any time or times during the said intended coverture the said Eleanor Savile or Robert Jamieson in her right shall by gift, will, settlement, succession, transmission or otherwise become beneficially interested in or entitled to any leasehold tenements or other personal estate (except plate, trinkets, furniture and jewels which shall be considered as property settled to the separate use of the

said Eleanor Savile and over which she shall have an absolute power of disposition)" such property should come into settlement.

After the marriage the income of Mrs. Jamieson was used in assisting to keep up the establishment and in 1886 a house was taken at Bournemouth for the purpose of furnishing which Mrs. Jamieson sometimes with and sometimes without her husband went to Messrs. *Hampton & Co.* and ordered goods to be sent down to the amount in all of 226*l.*, which was paid by a bill of exchange accepted by Mr. Jamieson and duly met by the Wilts and Dorset Bank.

A receiving order was subsequently made against Mr. Jamieson upon which he was adjudicated bankrupt and the trustee in the bankruptcy now claimed the furniture in question.

The trustee also claimed as belonging to him the presents made to Mrs. Jamieson before or on occasion of her marriage.

E. Cooper Willis, Q. C. : for the trustee.

The furniture now claimed by the trustee was ordered to be sent down to the husband's address. It was addressed to him and the account was made out to the husband who accepted a bill of exchange for the money. The contract was made between Mr. Jamieson and *Hampton & Co.* Some difficulty at first appears to have arisen as to the payment of the bill and in order that it might be met by the bank Mrs. Jamieson undertook that her next quarter's allowance should be paid in to the husband's account. But there is no evidence that the furniture became hers. The acceptance was given by the husband and that was a conditional payment which became absolute if the bill was met.

[CAVE, J.: The evidence shows that Mrs. Jamieson gave her husband the first quarter's allowance to pay for these goods which he did not do. So she had to give him the second quarter and did it through the bank.]

She was in the habit of handing in all her income and the husband used to give her back such sums as she required. This was furniture which would naturally belong to the husband unless the wife bought it for herself and there is no evidence of that.

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Then as to the wedding presents. In the ordinary way by the common law all property and chattels personal belonging to a lady on her marriage by virtue of the marriage pass to the husband. Wedding presents come within the ordinary rule of chattels. Apart from the question of settlement the property would pass to the husband and there is nothing in the common law of England which excepts marriage presents from the ordinary rule that what belonged to the wife passed to the husband. (Counsel referred to *Williams v. Mercier*, L. R. 9 Q. B. D. 337; 51 L. J. Q. B. 594; 47 L. T. 140; 30 W. R. 720.) Then it is said that this settlement covers the wedding gifts. But the words of the settlement only apply to property which will be acquired after the date of the marriage.

Yate Lee: for Mrs. Jamieson.

The furniture was purchased from Messrs. *Hampton & Co.* by Mrs. Jamieson and was purchased out of her separate property.

[CAVE, J.: You need not trouble about that part of the case.]

Then as to the wedding presents I say that those were her separate estate by nature of the gift or they are bound by the covenant in the settlement. In the case of *Graham v. Londonderry* (3 Atk. 393), the Lord Chancellor HARDWICKE, said "First as to the diamonds given her by Governor Pitt her husband's father and which were a present to her on the marriage with his son. This Court of later years have considered such a present as a gift to the separate use of the wife: and I am of opinion she is entitled in her own right. The next question was as to four diamonds set about the picture of the late regent of France. Lord Londonderry returned from France and delivered this picture to Lady Londonderry and said at the same time it was a present sent her by the regent of France. If this be considered as a present from the regent of France it falls under the same rule, for being a present by a stranger during the coverture must be construed as a gift to her separate use though I do not think it so clear a case as the other. There have been several cases. Mrs. Hungerford's case, which was money appropriated for her separate use and decreed to

her. Another case of the late Countess Cowper before Sir Joseph JEKYLL, several trinkets were given her by Lord Cowper in his lifetime and determined to be her separate estate. Two cases in my time. The first was *Lucas v. Lucas*, July 2nd, 1738, 1 T. Atk. 270. There were two questions one in respect of 1000*l.* South Sea annuities which the husband had transferred in the name of his wife: the other as to jewels, &c., given by the plaintiff's wife's father to the wife. I was of opinion she was entitled both to the South Sea annuities and the jewels, because I considered them as given to her separate use. The second case was heard upon November 19th, 1740, *Brinkman v. Brinkman*. Certain pieces of plate were given to the wife immediately after the marriage by the husband's father. I was of opinion they were to be considered as gifts to the wife for her separate use." That is the leading case on the subject of wedding presents, &c., and your Lordship expressed much the same opinion when the case of *Williams v. Mercier* was in the Divisional Court (47 L. T. 140). These gifts which were wedding presents of china, inkstands, and drawing-room ornaments generally were in the nature of the gift given to the wife for her separate use and cannot be taken by the creditors. But suppose otherwise and that they pass to the husband on the marriage. The effect of the settlement is to provide that all property which he shall become entitled to in her right is to be bound by the settlement except such articles as are now claimed. Plate, trinkets, furniture and jewels which he shall become entitled to in her right shall become her separate property. Therefore whether the property was separate property or not it is excluded from the husband.

CAVE, J.:

In this case two points were raised, first, whether the trustee of Judgment. the husband is entitled to certain furniture bought from Messrs. Hampton & Co.; and secondly, whether the trustee is entitled to the presents made to this lady before or on occasion of her marriage. As to the furniture I cannot entertain any doubt. This lady had 1000*l.* a year settled to her separate use and which went to keep up the establishment. She went and bought this furniture meaning it to be paid for out of her separate property, and she gave to

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her husband a quarter's allowance to pay the bill for it. He did not do so but used the money for another purpose and thereupon she caused another quarter's instalment to be paid into the bank to recoup the bank for meeting the bill. That is the long and short of it. The furniture was bought out of money which was the separate property of the wife and in the absence of any evidence to shew that the wife intended to make a present of the money or the furniture to the husband the furniture belongs to the wife.

As to the presents there are different considerations. With regard to the presents made on the marriage it seems to me to be always a question of intention and if it could be shewn that any of the articles were given to the husband so as to be liable for his debts the trustee would be entitled to them. But there is no proof of that here. They were given to the wife in contemplation of the marriage, and I am of opinion that that makes them the separate property of the wife. Further than this with regard to those presents and also those given before marriage I am of opinion that they come within the clause of the settlement to which my attention has been called :—"if at any time or times during the said intended coverture the said Eleanor Savile or Robert Jamieson in her right shall by gift, will, settlement, succession, transmission or otherwise become beneficially interested in or entitled to any leasehold tenements or other personal estate (except plate, trinkets, furniture and jewels which shall be considered as property settled to the separate use of the said Eleanor Savile and over which she shall have an absolute power of disposition)" such property should come into settlement. Now I think the words do include those things which were the gifts to the wife before the marriage and also are sufficient to cover the gifts given to her on her marriage. The clause runs "by gift, will, settlement, succession, transmission or otherwise." The word "otherwise" must be read to extend to things of an analogous nature, and it seems to me that "succession" and that right which a husband acquires by marriage are of a similar nature. It is something in the nature of a gift by the wife to the husband and they are not things which the husband has himself purchased with his own money. Therefore I think the words are wide enough to cover the acquisition of the things—both the things she had before and which were given to her on her

marriage. It is said that the words only apply to property which will be acquired by the modes mentioned at some future time, and only apply therefore to things acquired after the date of the marriage. But if that be the meaning things of this description which she has got at the time will become the husband's, but things which she will get afterwards will be her separate property and what could be the object of that. The intention was that the plate, trinkets, furniture, and jewels which she has shall remain her property. Why should they make an agreement as to future plate, trinkets, furniture, and jewels and not make an agreement as to those she had in possession? In my opinion therefore all the things were the separate property of the lady and did not pass to the trustee, and the motion must be refused with costs.

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IN RE
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Application refused with costs.

Solicitors : *E. Lee*, for the trustee in bankruptcy.

Hunter & Haynes, for Mrs. Jamieson.

Cases relied upon :—

Williams v. Mercier, L. R. 9 Q. B. D. 387 ; 51 L. J. Q. B. 594 ; 47 L. T. 140 ; 30 W. R. 720.

Graham v. Londonderry, 3 Atk. 393.



PRACTICE.

DIVISIONAL
COURT.

BEFORE
CAVE, J.,
AND
CHARLES, J.
1889.
January 28th.

IN RE SMITH & SONS, EX PARTE ROOK.

*Bankruptcy Act, 1883, section 4, sub-section 1 (a), and section 7.
Bankruptcy Rules, 1886. Rule 129.*

Petition—Objection by Debtor—Assent of Petitioning Creditor to Deed of Assignment—Receiving Order on Petition of another Creditor—Petition dismissed with Costs—Appeal by leave as to Costs.

Objection having been taken by the debtors to a bankruptcy petition presented against them on the ground that the petitioning creditor had assented to the deed of assignment which he relied upon as the act of bankruptcy, the hearing of such petition was, after certain evidence had been taken, adjourned *sine die* with liberty to apply.

Shortly afterwards a receiving order was made against the debtors on the petition of another creditor who had not assented to the deed, and the former petition was subsequently dismissed by the County Court registrar with costs.

Held: That although the registrar was right in refusing to allow the costs of the first petition to come out of the estate; yet he was not justified under the circumstances in directing the creditor to pay the costs of the bankrupts; and that the proper order to be made would be that the petition be dismissed without costs.

THIS was an appeal from an order of the registrar of the Nottingham County Court dismissing, with costs, a bankruptcy petition which had been presented against the debtors by Mr. Rook.

The appeal being one in respect of a question of costs was brought by leave under Rule 129 of the Bankruptcy Rules 1886.

On July 5th, 1888, a meeting of the creditors of the debtors who carried on business as grocers under the style of *J. W. Smith & Sons* was held, at which a proposal was made that a deed of assignment should be executed by the said debtors for the benefit of their creditors, which was accordingly done.

On July 9th, 1888, a bankruptcy petition founded on the deed as an act of bankruptcy was presented by *Rook* who was a creditor for 250*l.*, against the debtors, but an objection was thereupon taken by them that the petitioning creditor had approbated the execution

of the deed, and was therefore precluded from so relying upon it as an act of bankruptcy.

On July 20th, 1888, the petition came on for hearing, and after the examination of several witnesses was adjourned until August 1st, on which day, after more evidence had been taken, by arrangement between the solicitors of the parties it was again adjourned *sine die* with liberty to apply.

On August 10th, 1888, a bankruptcy petition was presented against the debtors by one *Swain* who had not been present at the meeting, and on September 17th, 1888, a receiving order was made on that petition.

Application having been made by *Rook* to fix a day to deal further with his petition the debtors applied that it might be dismissed for want of prosecution, and on September 24th, 1888, the petition presented by Mr. *Rook* was without further hearing dismissed by the County Court registrar, with costs.

From that order *Rook* now appealed.

E. Cooper Willis, Q. C. (Herbert Reed with him) : for Mr. Rook.

The registrar was right in dismissing Mr. *Rook's* petition. There had been a receiving order obtained by *Swain* and it was no good having another. But he was wrong in dismissing it with costs. In a case where there is a contest you must hear the case to the end if you impose costs. But here Mr. *Rook* was prepared to go on unless he was stayed but the registrar without hearing the case said he should look upon him as an unsuccessful litigant and should make him pay costs. (Counsel referred to *Ex parte Page, In re Springall*, 25 L. T. 716 : *The Earl of Portarlington v. Damer*, 2 Phill. 262.)

Wildey Wright (McCullagh with him) : for the debtors.

What the registrar did was an act of discretion on his part and this Court will not interfere with that exercise of discretion. *Swain* did not put forward his petition *mero motu* but did so on behalf of *Rook* who promised to bear the costs of the second petition. That fact was sworn to and on that the registrar thought that the second petition was a creature of *Rook's*. *Swain* was induced to present his petition by one *Bright* who had acted as

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1889. solicitor for *Rook*. The registrar thought the first petition was abandoned as it stood over from August 1st until September 18th, and he was of opinion that the debtors were put to unnecessary expense in appearing to defend two petitions.

IN RE
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EX PARTE
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CAVE, J.:

Judgment.

In this case no appeal would lie without leave and the registrar having given leave it seems to me that we are placed in the same position as the registrar was and it is useless to say that the registrar had a discretion and that we ought not to review it. We are put in the same position as the registrar was and must give our own opinion on the case. Now I think it would have been safer and better if *Rook* had left someone else to present a petition as he had been present at the meeting, though in certain cases there are reasons of course why a petition should be at once presented. Yet although it might have been better if someone else had presented a petition I cannot see that *Rook* was so wrong in presenting it that he ought to pay the costs of the other side. What happened was that the objection that he was a party to the deed was taken and taken so strongly that two sittings only got half way through the case and costs were incurred. What took place was great waste of time. The debtors had committed an act of bankruptcy which anybody who had not assented to the deed could make them bankrupt upon and to go on wasting money in fighting *Rook's* question was very foolish. Under the circumstances another petition being presented—whether by *Rook's* help or not seems to me immaterial—the natural course would be not to go on with the inquiry. I think the registrar was right in refusing to allow the costs to come out of the estate as *Rook* ought to have borne in mind that this point against him might be taken. But the registrar was wrong in making him pay the bankrupts' costs as there was nothing which could prevent them being made bankrupt. The proper order would be that the petition be dismissed without costs. The order we make will be, Appeal allowed and order discharged so far as it deals with the question of costs,—order to stand petition dismissed without costs and there will be no costs of the appeal but the deposit will be returned.

CHARLES, J.:

I am of the same opinion.

Appeal allowed accordingly.

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IN RE
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ROOK.

Solicitors: *Lee, Ockerby & Everington*, for Mr. Rook.

H. Rumney, for the debtors.



PRACTICE.

IN RE CHANTRY & BREWSTER, Ex parte PEACE.

DIVISIONAL
COURT.

Bankruptcy Act, 1883, section 54.

BEFORE
CAVE, J.
AND
CHARLES, J.
1889.

Solicitor's Costs—Partnership Action—Bankruptcy—Order by Consent—Construction of Order—Right of Trustee in Bankruptcy.

January 29th.

During the pendency of a partnership action between the debtors they were adjudicated bankrupt, and an order by consent was subsequently made by which the receiver in the action was directed to pass his accounts and to tax the costs, and that such costs when taxed be paid by the receiver out of the balance in his hands and the residue of the balance be paid to the trustee in the bankruptcy.

Held: That on the true construction of the order the receiver was right in paying to the solicitors of the plaintiff and defendant in the action their taxed costs; and in handing over the balance after such payment to the trustee in the bankruptcy.

But that such an order could not be binding on the trustee except in so far as he had made it binding on him by assenting to it.

Where after the commencement of a partnership action a receiving order is made against the parties, the solicitors in the action have no right to obtain behind the back of the trustee in the bankruptcy a consent order by means of which their costs will be paid out of the partnership assets.

In order to obtain such an order the trustee must be made a party to the application and if that is not done he is at liberty to apply to the Court of Bankruptcy for a declaration that the consent order is of no worth as against him.

THIS was an appeal from an order of the judge of the Birmingham County Court by which he declared that certain payments by

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the appellant *J. H. Peace*, as receiver in a chancery action of *Chantry v. Brewster*, of the sums of 85*l.* 9*s.* 2*d.* and 54*l.* 1*s.* 10*d.* to the solicitors in the said action were irregularly and improperly made, and that such payments were void as against *E. M. Sharp* the trustee in the bankruptcy; and further ordering the receiver to repay to the trustee the said sums with costs.

In 1886 an action for dissolution of partnership was commenced between the debtors *Chantry* and *Brewster* in which the appellant *J. H. Peace* was appointed receiver.

On April 17th, 1887, while the action was pending, a receiving order was made against the debtors and the action thus became abortive. The debtors were adjudicated bankrupt and on July 8th, 1887, *E. M. Sharp* was appointed trustee of their estate.

On July 21st, 1887, a consent order was made in the Chancery Division by which it was ordered "that J. H. Peace the receiver appointed by the order dated September 11th, 1886, do pass his first and final account, and it is hereby referred to the taxing master to tax the costs of the plaintiff and defendant in this action as between solicitor and client, and it is ordered that such costs when taxed be paid by the receiver out of the balance in his hands, and it is ordered that the receiver do pay the residue of the balance to *E. M. Sharp* the trustee in the bankruptcy; and that on payment the receiver be discharged."

The trustee was cognisant of this order, but on December 8th, 1887, he gave notice to the receiver claiming the sums allowed for costs as belonging to the debtor's estate.

On January 31st, 1888, however the receiver paid the amount of the taxed costs to the solicitors in the chancery action, and handed over the balance to the trustee.

Notice of motion was thereupon served by the trustee upon the receiver claiming the money paid to the solicitors, and an order was made by the County Court judge directing the receiver to repay that amount to the trustee.

From that order *J. H. Peace* the receiver now appealed.

Marten, Q. C. (Herbert Reed with him): for the receiver.

By the order of July 21st, 1887, the solicitors had a right to their costs. Taxation was to take place and the balance was to go

to the trustee. If the trustee had a right to the whole of the money taxation was quite unnecessary. The order directed the receiver to pass his accounts and that the costs of the plaintiff and defendant should be taxed and paid by the receiver out of the balance in his hands and the residue of the balance be paid to the trustee. The trustee consented to this order and it is clear from the correspondence that negotiations had been going on with regard to the payment of these costs. The solicitors were claiming their costs and they had a perfect right to have them paid. That is shown by the case of *In re Suffield & Watt, Ex parte Wiggins* (see *ante*, Vol. V. p. 83 : L. R. 20 Q. B. D. 693 ; 58 L. T. 911 ; 36 W. R. 584). The County Court judge said that the solicitors had no rights except under the order, and that the order of July 21st did not bear the construction that the costs were to be paid to the solicitors but to anyone who might be found to be entitled and that in the absence of anybody else the trustee was entitled.

[CAVE, J. Why did not the trustee take proceedings against the solicitors who have the money rather than against the receiver who has not ?]

That I cannot tell. The trustee here knew about the order and in fact desired us to go to taxation. The solicitors were clearly entitled to their costs. (Counsel also referred to *Guy v. Churchill*, L. R. 35 Ch. Div. 489 ; 56 L. J. Ch. 670 ; 57 L. T. 510 ; 35 W. R. 706 : *Haymes v. Cooper*, 33 Beav. 431 : *Bailey v. Birchall*, 2 H. & M. 371 : *Scholfield v. Lockwood*, L. R. 7 Eq. 83.)

Sidney Woolf: for the trustee.

The case raises an important question whether where there is an insolvent estate two solicitors instead of proceeding in bankruptcy can by commencing an action for dissolution and appointing a receiver run up costs and get them out of the estate. The order of July 21st, 1887, is a simple order directing taxation and it cannot be held to give a charge.

[CAVE, J. Why did you not claim against the solicitors ? Here you do not take any steps against the parties who are to

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blame if anybody is, but you come upon the unfortunate receiver who has only done what the order tells him.]

The order is a simple order directing payment to the plaintiff and defendant but not to the solicitors. The letter which is said to be a letter of consent on the part of the trustee only relates to the plaintiff's costs. The order is an order to the persons named therein and the construction put upon it by the County Court judge was right.

CAVE, J.:

Judgment. I am of opinion that this appeal must be allowed. I understand the County Court judge to have held that the order of July 21st, 1887, was binding on him but that on the true construction of that order it did not direct the receiver to pay these costs to the solicitors. I am unable to agree with that construction of the order. If we look at all that took place before the order was obtained and at the form of the order it seems impossible to come to the conclusion that this was an order solely for taxation and that nothing was to follow and that nothing was directed as to the persons who were to be paid. It is obvious from the correspondence that the solicitors were negotiating with the trustee for the payment of their costs and looking at all the circumstances I am of opinion that the meaning of the order was that the costs when taxed were to be paid to the solicitors by the receiver out of the balance in his hands. They were not to be paid to the trustee because the order goes on that the residue of the balance be paid to the trustee. It follows that the solicitors are the persons who had obtained the order in question. Therefore I am unable to agree with the County Court judge in the conclusion to which he came with regard to the meaning of the order.

That is enough to dispose of this case according to the view which the County Court judge appears to have taken of the law. I desire however to say that I cannot altogether acquiesce in the view which the County Court judge took. It does not appear to me that this order was binding on the trustee except in so far as he has made it binding on him by consenting to it. In this case there had been an act of bankruptcy before the order was obtained and it

is impossible to say that after an act of bankruptcy has been committed two solicitors representing two persons who have become bankrupt can go behind the trustee and obtain an order by consent which would be of force and validity on the assets of the partnership. In order to give it validity the trustee must be a party to it. It is not now necessary to enquire whether this order can be supported if attacked because it must be done in such a manner that the solicitors can come forward and support the order. I wish to guard myself also from saying that this is a case in which such an attack should be made. What I do say is that I cannot agree that after a receiving order has been made, because there was a partnership action before the receiving order, the solicitors can go and behind the back of the trustee obtain a consent order and therefore their costs shall be paid. There is no authority for that and in order to obtain such an order they must make the trustee a party to the application and if the trustee is not made a party he may go to the Court of Bankruptcy and obtain a declaration that the consent order is of no worth or validity.

Here the order was in July, 1887. The trustee who knew of the order did nothing until December, 1887, and then instead of taking the proper steps to set aside the order of July 21st, 1887, he simply served the receiver who was an officer of the Court with a notice not to obey the existing order of the Court. That was not the proper course for him to take, nor is it the proper course to bring the motion against the receiver alone. The trustee does not bring it against the solicitors who have the money in their pockets, but against the receiver alone who has only obeyed the order of the Court which the trustee took no steps to set aside. Under the circumstances I am clearly of opinion that the order to repay should not be made and that the receiver is entitled to have the order which was made against him set aside.

CHARLES, J.:

I agree. The only question which it is really necessary for us to decide is the true construction of the order of July 21st, 1887. Upon that date the trustee had been in communication with the solicitors both of the plaintiff and the defendant for the settlement of these costs, and this consent order was made by which the

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receiver was directed to pass his accounts and tax the costs, and that such costs when taxed be paid by the receiver out of the balance in his hands. Now if the order stopped at the word "hands," I should be of opinion that it meant that the costs be paid to the solicitors. But it goes on that the receiver pay the residue of the balance to the trustee. It cannot be that the costs be paid out of the balance in his hands to Sharp the trustee, and the residue to Sharp. In my opinion therefore the County Court judge was in error in coming to the decision to which he did.

Appeal allowed with costs.

Solicitors : *Goldberg & Langdon*, agents for *A. J. O'Connor*, Birmingham, for the receiver.

Deacon, Gibson & Medcalf, agents for *Rowlands*, Birmingham, for the trustee.

PRACTICE.

DIVISIONAL
 COURT.
 BEFORE
 CAVE, J.

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 CHARLES, J.
 1889.
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IN RE HUGGINS, Ex PARTE HUGGINS.

Bankruptcy Act, 1883, section 28.

Discharge—Order suspended for Six Months—Condition—Consent to Judgment—Cumulative Sentence.

The Court cannot under section 28 of the Bankruptcy Act, 1883, make a conditional order of discharge and also suspend the order.

Thus where the County Court Judge suspended the discharge of a bankrupt for six months and also attached the condition that the bankrupt should consent to judgment being entered against him under section 28, sub-section (6) of the Bankruptcy Act, 1883.

Held: That the order in question must be set aside, and the case remitted to the County Court Judge for reconsideration.

THIS was an appeal from an order of the learned Judge of the Wandsworth County Court made on the application of the bankrupt *Huggins* for his discharge.

At the hearing of the application the official receiver reported that the bankrupt had committed three of the offences specified in section 28, sub-section (3) of the Bankruptcy Act, 1883, in that, (a) he had not kept proper books; (b) that he had continued to trade after knowing himself to be insolvent; and (c) that he had contracted debts without any reasonable or probable ground of expectation of being able to pay them.

The County Court judge suspended the discharge for six months, and he also attached the condition that the bankrupt should consent to judgment being entered against him under section 28, sub-section (6) of the Bankruptcy Act, 1883.

The bankrupt now appealed from that order on the ground that the County Court judge had power either to suspend the order of discharge or grant the discharge upon conditions but that under the Act he had no power to do both.

Sidney Woolf (Broxholme with him): for the bankrupt.

By section 28, sub-section (2) of the Bankruptcy Act, 1883, it is provided that, "On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned (see sub-section (3)), either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid." And by sub-section (6) "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the

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Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts." Upon those two sub-sections the County Court judge could either suspend the discharge or grant it on condition, but he could not do both. In the case of *In re Marks* (L. R. 1 Ch. App. 334 ; 35 L. J. Bank. 16) it was held that the Court could only inflict on a bankrupt one of the penalties specified in section 159 of the Bankruptcy Act, 1861. There the bankrupt had been sentenced by the commissioner to imprisonment for six months and to have his order of discharge suspended for a year, for omitting to keep proper books of account and contracting debts without reasonable ground of expectation of being able to pay them. But Lord Chancellor CRANWORTH, on appeal, held that there was no power to suspend the order of discharge and imprison.

Muir Mackenzie: for the official receiver.

The report of the official receiver stated three facts, viz.:—That the bankrupt had not kept proper books ; that he had continued to trade after knowing himself to be insolvent ; and that he had contracted debts without reasonable expectation of being able to pay them. The County Court judge intended to inflict a severe sentence. Then as to whether the order made is within the statute, I submit it is. The case cited was under a different Act, which provided for two things, viz. : granting a discharge and imprisonment. The present statute only deals with granting a discharge. The official receiver of course only appears in this case in his official capacity.

CAVE, J :

Judgment.

I think on the grammatical construction of this section the only conclusion I can come to is that the Court cannot make a conditional order and also suspend the order. There is no reason why the Legislature should not have given that power to the Court, as far as one can see, and there is no reason why it should, as far as one can see. But one has no guide at all, except the bare technical meaning of the passage, and looking at the passage as it stands, and bearing in mind that one ought to be satisfied, when it tells against the bankrupt, that it is what is intended by the Legislature, for, of course, this is a quasi-penal enactment, the con-

clusion I come to is that the Legislature has not expressed its intention that the Judge shall have power to do both. The natural grammatical meaning is that he may either grant an absolute order of discharge or he may grant an order suspending it for a certain time, or he may grant it with conditions. In order to justify what the Court has done in this case, one must read the word "or" as one sometimes does in charter-parties, "and or," so that the "or" might be read "and." I think one is not at liberty without good reason to change "or" into "and."

I am therefore of opinion that the appellant is entitled to succeed, and that the order made should be set aside, and the case remitted to the learned County Court judge with this expression of our opinion, so that he may pass what he deems to be the proper sentence under the circumstances. Of course, having now to pass sentence, he will be at liberty to take into consideration all that has happened including the fact that the order of discharge has been suspended for a certain time, and if he thinks he ought to modify that condition, it will be in his power so to order: if he thinks he ought not to modify it, then he will act accordingly.

I do not think there can be any costs of this appeal, for the reasons which Mr. Mackenzie has urged upon us, viz., that the official receiver is only here in his official capacity. We therefore cannot make him pay the costs and we can give no direction. I suppose there is no fund out of which the costs can come. Is there a fund being administered in Court?

Muir Mackenzie: The official receiver, my Lord, is also official trustee.

CAVE, J.: Has he any estate out of which he can take his costs?

Muir Mackenzie: I cannot tell your Lordship that.

CAVE, J.: If you have such an estate you may have permission to take your costs out of it.

CHARLES, J.:

I am of the same opinion.

Appeal allowed.

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Solicitors: *Aird & Hood*, for the bankrupt.

The Solicitor to the Board of Trade, for the official receiver.

Case relied upon:—

In re Marks, L. R. 1 Ch. App. 384; 35 L. J. Bank. 16.

PRACTICE.

DIVISIONAL IN RE CLARK, EX PARTE KEARLEY AND THE BANKRUPT COURT.

BEFORE *Undischarged Bankrupt—Property acquired after Adjudication and before Discharge—Claim of Trustee—Right of Third Parties to indemnity for Expenses incurred in respect of after acquired Property.*

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The bankrupt before obtaining his discharge carried on business unknown to his trustee and acquired property.

This property was subsequently taken possession of by the trustee and application was thereupon made by a person who alleged that he had advanced certain moneys to the bankrupt for the purpose of improving such after acquired property that he might be paid out of it, while the bankrupt himself applied for an indemnity.

Held: That as a matter of fact there was no proof that the alleged creditor had ever advanced any sums to the bankrupt which had not been repaid.

And further that in any case as the applicant knew that the bankrupt had not obtained his discharge and that the property in respect of which he was dealing was the property of the creditors he had no equity.

Also that the bankrupt was not entitled to claim an indemnity and that he had not acted as the agent of the trustee.

But *quere* whether there is a complete immunity of the trustee from all liability in respect of honest claims made in such case against the bankrupt.

THIS was an appeal from an order of the learned Judge of the County Court at Croydon refusing an application made by one *Kearley* for an order declaring that he was entitled to a lien to the

extent of 951*l.* on certain moneys acquired by the bankrupt after adjudication and before discharge ; and that the said sum of 951*l.* might be paid to him.

There was also an appeal by the bankrupt *W. Clark* from an order made at the same time refusing an application then made by him for an order declaring that he was entitled to an indemnity out of the said moneys in respect of the sum of 951*l.* claimed by *Kearley* as due to him, and of 87*l.* 17*s.* due to one *Newton* an architect.

On July 2nd, 1886, a receiving order was made against the debtor *Clark* who carried on business as a builder upon which he was adjudicated bankrupt.

On July 22nd, 1886, after the adjudication the bankrupt was by means of certain friends who subscribed money for the purpose put into the Ambassador public-house in the Caledonian Road which he continued to carry on in the name of a friend named *E. H. Clarke* without the knowledge of the trustee until March 31st, 1887, when the house was burned down.

The premises were immediately rebuilt, however, partly out of the insurance money, Mr. *Newton* being the architect of the new building, his fees for the work and plans so done by him amounting to 87*l.* 17*s.*, and it was alleged that *Kearley* paid large sums of money to persons who supplied materials for the rebuilding the balance now due to him in respect of such advances being 951*l.*

In February, 1888, the new premises were sold to a Mr. *Chattey* with the result that after payment of the brewers and distillers there remained for the bankrupt a sum of 1,815*l.*

A dispute having arisen between *E. H. Clarke* and the bankrupt the official receiver as trustee in the bankruptcy was informed by the bankrupt of this fact, who went down and received the money and paid it into the Bankruptcy Estates account.

Application was thereupon made to the County Court judge by *Newton* and *Kearley* for an order that they were entitled to be paid their charges out of the said sum ; and at the same time the bankrupt *Clark* applied for an order declaring that he was entitled to be indemnified in respect of such charges in the event of the other applicants failing in their claim.

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The County Court judge refused all the applications, and from that refusal *Kearley* and the bankrupt now appealed, Mr. *Newton* being content to abide by the decision of the County Court judge and not being a party to the present appeal.

Sidney Woolf (Broxholme with him) : for the appellants.

The case raises the important question as to what are the rights of a bankrupt or of persons who have trusted the bankrupt to be indemnified against expenses to which the bankrupt has been put in respect of after-acquired property, those expenses having been incurred before the trustee intervenes and claims the property. If a bankrupt acquires property after bankruptcy and before discharge he has a right to it against all the world except the trustee and until the trustee intervenes, and when the trustee intervenes he must take it subject to the equities. Here *Kearley* paid the moneys to persons who supplied materials for rebuilding the premises, and the County Court judge appeared to think that he ought to be looked upon with suspicion because he knew that *Clark* was a bankrupt. It was argued that under section 54 of the Bankruptcy Act, 1883, as property present or future at once vested in the trustee, the trustee was entitled to it immediately it was acquired by the bankrupt without doing anything and that no one could acquire it. But section 54 really throws no light on the matter. The case of *Herbert v. Sayer* (5 Q. B. 965; 13 L. J. Q. B. 209) decided that a bankrupt had a good title to all property acquired and a right to sue on all contracts made with him between the fiat and the allowance of his certificate; and also after the allowance of his certificate under a second fiat against him under which his estate had not paid 15*s.* in the pound, unless his assignees interfered and claimed the property, or the benefit of such contracts. And in *Jameson v. Brick and Stone Company Limited* (L. R. 4 Q. B. D. 208) it was held that "An undischarged bankrupt may maintain an action in respect of a debt due to him for work and labour done after his bankruptcy if the trustee does not interfere." The bankrupt acquires after-acquired property as the agent of the trustee and until the trustee intervenes the bankrupt is entitled to the property against all the world. The doctrine of principal and agent applies and the agent is entitled to be indemnified for expenses incurred

with respect to it. (Counsel also referred to *Meux v. Smith*, 11 Sim. 410.)

Muir Mackenzie (Clayton with him) : for the trustee.

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Kearley was not entitled to any lien nor was the bankrupt entitled to any indemnity. The claim of *Kearley* was in respect of moneys alleged to have been advanced to assist the bankrupt to rebuild the Ambassador public-house but no credit is to be attached to the evidence on which his claim to such lien was founded, and independently of the question of law raised in Mr. *Newton's* claim which was an honest claim, the County Court judge stated that he did not believe that the balance claimed by *Kearley* was due to him and that that claim was not made out. Then as to the proposition of law. *Kearley* was a creditor of an undischarged bankrupt trading without the knowledge of the trustee and his creditors, and if an undischarged bankrupt so trades and in doing so acquires property creditors who supply goods and do work for him have no right to be paid in priority out of the after-acquired property—*a fortiori* as here if the creditor knows that the man is an undischarged bankrupt. *Kearley* knew the whole thing from the beginning and if he did the work on the property he knew it was the property of the creditors. In any case there can be no equity where the creditor is not an innocent party and knows the bankrupt has no property and that the property he is dealing with is the property of the creditors. Then as to the claim of the bankrupt. It is said that the bankrupt is an agent and is entitled to an indemnity from his trustee. But it is absurd to say that an undischarged bankrupt trading in fraud of his creditors can sue his trustee for an indemnity, for that is what it comes to. The case of *Herbert v. Sayer* (5 Q. B. 965) certainly never went to the extent of saying that the doctrine that an agent is entitled to be indemnified by his principal extends to the case of an undischarged bankrupt and his trustee. (Counsel referred to *Storey on Agency*, 8th Ed. p. 433 : *Ramsden v. Dyson*, L. R. 1 H. L. 129 ; 14 W. R. 926 : *In re Dowling, Ex parte Banks*, L. R. 4 Ch. Div. 689 ; 46 L. J. Bank. 74 ; 36 L. T. 117 ; 25 W. R. 515 : *Ex parte Ford, In re Caughey*, L. R. 1 Ch. Div. 521 ; 45 L. J. Bank. 96 ; 34 L. T. 694 ; 24 W. R. 590.)

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Judgment.

CAVE, J.:

I am of opinion that this appeal must be dismissed. I think the case should be treated on the ground on which the County Court judge decided it, viz.:—on the facts and not as a question of law at all. Looking at the evidence which was put before the County Court judge he was in my opinion right in coming to the conclusion to which he did. It is impossible to place any credit on the statement either of Kearley or the bankrupt. Even if we could not go to that extent we should not be justified in overruling the decision of the County Court judge on a question of fact in which he has had the witnesses before him. But I go further and I say that I do agree with the question of fact as found by the learned County Court judge and I am not prepared to say that Kearley advanced one single penny of the money he now claims.

With regard to the claim made by the debtor for an indemnity I am of opinion that it cannot be sustained. I am not aware of any case which goes to the extent of saying that a person who does not profess to act as agent for another, but on the contrary professes to act on his own behalf and keeps secret from that other what he has been doing can claim an indemnity. I cannot agree that a person who does that, if he is discovered and compelled to disgorge, has any right to be indemnified by the trustee against any liability which he has incurred in the course of the business. His proper course in order to obtain an indemnity is to go to the trustee and obtain his sanction. If the trustee gives his sanction he becomes his agent, and has a right to an indemnity. But where a man knows that if he carries on business at all he ought to do so only with the knowledge of the trustee and then goes and intentionally conceals the fact and when discovered claims an indemnity, it would take very strong authority to satisfy me that he was entitled to an indemnity under such circumstances. If so persons who trusted the bankrupt knowing all the facts and who consequently would not be entitled otherwise to claim payment would then obtain payment, as the bankrupt was entitled to his indemnity.

I wish also to make this further observation though I only give it as an expression of my opinion. As at present advised I cannot concur with the opinion expressed by the County Court judge as to the immunity of the trustee from all liability. I do not under-

stand the word "property" to mean that where the bankrupt has been carrying on business the trustee can take the assets and leave the liabilities unpaid. As at present advised—though as I have said I give it only as an expression of opinion—I think that the property is not the gross assets but the surplus assets after the liabilities. I do not see why the trustee should take the goods and divide them between the previous creditors and leave the persons to whom the goods belonged without payment. The appeal must be refused.

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CHARLES, J.:

I am of the same opinion. As to Kearley I agree with the County Court judge when he says that he was not satisfied that Kearley had made these alleged advances. Although he had made advances the County Court judge thought that those advances had been repaid to him. His case was not proved in fact. If it had been so another case would have arisen, for he would have been a person who had knowingly spent money on property which belonged to another person. If so, on the authority of *Ramsden v. Dyson* (L. R. 1 H. L. 129) he got no equity, and in that case I do not think he could have claimed against the trustee. The trustee did not know of it, and the claimant knew that the debtor was an undischarged bankrupt.

As to the bankrupt also I do not think he has any claim to an indemnity. What he relies on is that he was agent of the trustee. But he did not do what he did for the trustee but secretly for himself. An agent is entitled to be indemnified for losses in the course of his agency, or losses incurred by the direction of his principal. These were not such losses and the mere fact that the trustee has claimed the property does not make him responsible. The doctrine of principal and agent does not apply.

As to Mr. Newton's case,—Mr. Newton is not really before the Court. If his case had been before the Court it would have raised a further question which has been referred to by my brother CAVE, viz.:—Whether there is an absolute immunity in the trustee with reference to honest claims made against the bankrupt. That is an important question, but it is not necessary now to decide it.

Appeal dismissed.

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Solicitors: *Aird & Hood*, for the appellants.
Thomson & Ward, for the trustee.

Cases relied upon and referred to:—

Herbert v. Sayer, 5 Q. B. 965; 18 L. J. Q. B. 209.

Jameson v. Brick and Stone Company, Limited, L. R. 4 Q. B. D. 208; 48 L. J. Q. B. 249; 39 L. T. 594; 27 W. R. 221.

Meux v. Smith, 11 Sim. 410.

Ramsden v. Dyson, L. R. 1 H. L. 129; 14 W. R. 926.

In re Dowling, Ex parte Banks, L. R. 4 Ch. Div. 689; 46 L. J. Bank. 74; 86 L. T. 117; 25 W. R. 515.

Ex parte Ford, In re Caughey, L. R. 1 Ch. Div. 521; 45 L. J. Bank. 96; 84 L. T. 634; 24 W. R. 590.

PRACTICE.

IN RE TANENBERG & SONS, EX PARTE PERRIER.

DIVISIONAL
COURT.

BEFORE
CAVE, J.
AND
CHARLES, J.
1889.

January 30th.

Act of Bankruptcy—Execution of Deed of Assignment—Misrepresentations by Debtor—Assent of Creditor induced by Misstatements—Right of assenting Creditor to present petition.

Where the assent of a creditor has been given to the execution by a debtor of a deed of assignment the Court will not as a general rule allow such creditor to take advantage of the act of bankruptcy committed by the debtor in executing the deed in order to present a bankruptcy petition.

But the assent of the creditor must be obtained without fraud or misstatement, and if a debtor induces a creditor to give an assent by misrepresentations calculated to have effect on the minds of the creditors as to the true state of his affairs a bankruptcy petition may be presented by a creditor whose assent has been so obtained founded on the deed as an act of bankruptcy.

Thus where the debtors represented to a meeting of their creditors that they were in a solvent condition and could pay 20s. in the pound, thereby obtaining the assent of the creditors present to the execution of a deed of assignment, but the trustee under the deed subsequently sent out a statement shewing a dividend of about 8s. in the pound.

Held: That a creditor who had signed the resolution agreeing to the execution of the deed was entitled to present a bankruptcy petition against the debtors ; and that a receiving order must be made against them.

THIS was an appeal from an order of the registrar of the County Court at Leeds dismissing, with costs, a bankruptcy petition presented against the debtors by one *Perrier*, on the ground that the petitioning creditor had assented to the deed of assignment which he relied upon as the act of bankruptcy.

The appellant *Perrier* is a wholesale jeweller carrying on business in Hatton Garden, and the debtors, *Marcus Tanenberg* and *Nathaniel Tanenberg*, carried on business at Leeds as watchmakers and jewellers under the style of *Tanenberg & Sons*.

In July, 1888, the debtors being in difficulties consulted Mr. *Maud*, their solicitor, and instructed him to call a meeting of their

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creditors, which was accordingly done by a letter in an ordinary form.

This meeting of creditors was summoned to be held at the First Avenue Hotel, London, on July 12th, 1888, and duly took place, one of the debtors being present, together with Mr. *Maud* of Leeds, their solicitor, who produced to the meeting a memorandum showing that the whole of the liabilities of the firm of *Tanenberg & Sons* amounted to 900*l.*, and he stated that the assets amounted to about 1480*l.*, made up of 700*l.* stock, 500*l.* book debts, 30*l.* furniture, and 250*l.* payable by a member of the firm at Newcastle under an indemnity. And it was further stated that the debtors were perfectly solvent and able to pay 20*s.* in the pound, and an endeavour was made to induce the creditors to assent to a composition proposal of 20*s.* in the pound, payable by setting aside a portion of the profits arising out of the business, which were stated to be 40*l.* a month.

It was resolved by the creditors at this meeting, however, that an adjournment should take place in order that Mr. *Ehrenfeldt*, an accountant nominated by them, might go down to Leeds for the purpose of ascertaining whether the statements which had been made were true, and to prepare a statement of affairs and go through the stock for this purpose.

On July 19th and 20th, 1888, Mr. *Ehrenfeldt* attended at Leeds for the purpose of investigating the debtors' affairs and of reporting to the creditors accordingly, and examined their books and papers, and obtained from them information relating to their assets ; and from such information and investigation he prepared a statement of affairs based on the debtors' valuation of their effects. He also prepared a Report for the creditors, in which he expressed the opinion that it would be for their benefit to accept a secured composition of 20*s.* in the pound, such opinion being based, as he alleged, on the valuation by the debtors of their assets and the information given to him by them, as having regard to the fact that the debtors kept no proper books of account, and the business having been carelessly carried on, he was obliged to rely on the statements and information so given.

On July 28th, 1888, the adjourned meeting of creditors was held at the First Avenue Hotel, when the statement of affairs and

Report which had been prepared by Mr. Ehrenfeldt was read to the meeting, which was at first disinclined to accept the debtors' offer, but upon Mr. Maud, their solicitor, stating that the debtors' father was willing to join in a deed and to give up to the creditors his interest in certain securities held by the Exchange Bank and which he stated would benefit the estate to the extent of at least 700*l.*, and upon a Mr. Poppleton who was to be appointed as trustee of the proposed deed stating that immediately the deed was executed he was prepared to go to Leeds to redeem or deal with the securities held by the Bank and at once pay the creditors the amount of the surplus, the creditors at the meeting expressed their willingness to concur in a deed to be prepared in order to carry out the proposed arrangement, and a resolution to that effect was passed and duly signed amongst others by Mr. Perrier the present appellant.

On August 8th, 1888, the deed was executed, and on September 17th Mr. Poppleton the trustee under it sent out to the creditors a statement of affairs showing a dividend of about 8*s.* 3*d.* in the pound.

On October 26th, 1888, a bankruptcy petition presented by Mr. Perrier against the debtors founded on the deed as an act of bankruptcy was heard before the registrar of the Leeds County Court when three objections to the deed were taken on behalf of the petitioning creditor:—(1) That the deed as executed was not the deed contemplated by the resolutions; (2) that there was a fraudulent preference, as it contained a trust for the payment of the costs of the solicitor for preparing the same; and (3) that there was misrepresentation on the part of the debtors as to the state of their affairs at the time the resolutions were passed.

On November 2nd, 1888, the registrar dismissed this petition with costs, and from that order Mr. Perrier now appealed.

Tindal Atkinson, Q.C. (Herbert Reed with him): for Mr. Perrier.

No doubt it is perfectly true that if a creditor assents to the execution by the debtor of a deed of assignment he cannot turn round and make use of that deed as an act of bankruptcy against the debtor. But the consent must have been obtained without misrepresentation and misstatement. Here there was misrepresen-

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tation, and the creditor was induced by false statements of the debtors to do that which he otherwise would not have done if he had known the true facts. Mr. Perrier in his affidavit says, "I understood that the deed referred to in the resolution passed at the meeting was merely to give Mr. Poppleton the trustee of it full power over the estate so as to secure the payment of our debts in full. I never assented to any deed containing any provision or stipulation in favour of any particular creditor, or whereby I was to release my debt for anything less than payment in full."

Yate Lee: for the debtors.

All I have to shew is that the creditor was present at the meeting at which the resolution was passed and assented to the assignment. But in any case the difference here is so slight that the creditor was not really injured. In *Ex parte Stray, In re Stray* (L. R. 2 Ch. App. 374) "A debtor having called his creditors together, proposals were made as to a composition. The creditors insisted on an assignment of the debtor's property to trustees for their benefit. He refused to make it; but after the meeting had broken up, he executed such an assignment. G. one of his creditors was present during the preparation of this assignment, and though he denied having been present at its execution, the Court came to the conclusion that he had acquiesced in its being executed and taken a benefit under it, by having the property protected from execution. It was held that G. could not avail himself of the deed as an act of bankruptcy, although it might be that he had not so far assented to it as to be bound by its provisions."

CAVE, J.:

Judgment.

I am of opinion that this appeal must be allowed. The principle acted on by the County Court registrar is speaking generally correct, but it is subject to limitations. If the assent of a creditor is given and there is nothing to get rid of such assent, then it is clear that there is good ground for refusing to allow his petition, as if the creditor by assenting to the proposal of the debtor induces him to commit an act of bankruptcy then the Court will not allow him to take advantage of that act of bankruptcy which he has so induced the debtor to commit. But it is necessary also to see that

the assent of the creditor was obtained without fraud or misstatement. The state of things here was this. The debtors gave up all their property and the creditors are to take what they give over and are not to go into the Court of Bankruptcy with all the advantages which it offers. So it is essential that there should be no misrepresentation and that the statements made by the debtors should be substantially true. The debtors know in what position they are and the creditors cannot know. The knowledge of the creditors comes from the debtors or from some one sent down to examine into the matter and they have to content themselves with the information which they get from the debtors or their books.

Now at the first meeting of the creditors the debtors represented that they could pay 20s. in the pound and so the creditors agreed that it would be hard to make the debtors bankrupt. They send down an accountant to examine into the debtors' affairs and he reported that the books are badly kept but that there will be 20s. in the pound for the creditors. The debtors on that say nothing that would lead the creditors to suppose that this was not a fair statement of their affairs, and thereupon a deed of assignment is executed which provides that the solicitor of the debtors shall have a priority over the rest of the creditors for his costs which it is perhaps quite natural he should have if there is 20s. in the pound but not if there is only 8s. in the pound. It then comes to the knowledge of the trustee under the deed that the assets are nothing like the amount represented—that, in fact, there is only about half that amount. That is not all, because there are creditors for something like 1,350*l.* and not 900*l.* as represented. These are great misstatements, and it is impossible to say that the statement made by the debtors was not one calculated to have considerable effect on the minds of the creditors. The appellant gave his assent on the assumption that he would get 20s. in the pound, and owing to certain facts which the debtors must and ought to have known it turns out that he has had his consent obtained from him by false statements. Under these circumstances I have come to the conclusion that the appeal must be allowed and that a receiving order should be made on the appellant's petition.

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I have come to the same conclusion. I must admit that I was at first struck with the argument of Mr. Yate Lee when he said that the difference in the amount stated by the debtors and the actual amount was so small that the debtors ought not to be made bankrupt. But this is not the fact, as the first statement really shewed that the debtors were solvent while the actual fact was that they were anything but in that position and that there was a large deficiency.

Appeal allowed and receiving order made against the firm, it being admitted by the petitioning creditor that the father is not a member of the firm. Appellant's costs to be part of his costs as petitioning creditor.

Solicitors: *R. Raphael, agent for Bromet, Taylor & Bromet, Leeds, for Mr. Perrier.*

Torr & Co., agents for Maud, Leeds, for the debtors.

Case relied upon :

Ex parte Stray, In re Stray, L. R. 2 Ch. App. 374.



PRACTICE.

IN RE CARNE, EX PARTE JACKSON.

DIVISIONAL
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Bankruptcy Act, 1883, section 28.

BEFORE
CAVE, J.
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CHARLES, J.
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Discharge—Order to make up Dividend—Exclusion of particular Creditors from benefit of Order.

On application by the bankrupt for his discharge an order was made by *February 1st.* the County Court Judge by which he suspended the discharge for three months or such further time until a sum be paid to the trustee which with the dividend already declared would be sufficient to make up 10*s.* in the pound to all the creditors “except those for money lent.”

Held: That such an order excepting a particular class of creditors could not be supported; and that the case must go back to the County Court judge for rehearing.

THIS was an appeal on behalf of a creditor from an order of the judge of the County Court at Cardiff made on the application of the bankrupt *Carne* for his discharge.

The order in question was that the discharge of the bankrupt be suspended for three months or such further time until a sum should be paid to the trustee which with the dividend already declared would be sufficient to make up 10*s.* in the pound “to all the creditors except those for money lent.”

From this order *Jackson*, a creditor, now appealed.

Kisch: for the appellant creditor.

I do not know how the order of the County Court judge can be supported. He had clearly no right to except any particular class of creditors.

Yate Lee: for the bankrupt.

My first objection is that notice of this appeal has not been served on any of the creditors. By section 28, sub-section (5) of the Bankruptcy Act, 1883, notice of the appointment by the Court for hearing an application for discharge must be sent to every creditor who has proved, and at the hearing the Court may hear any creditor. By

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Rule 235 of the Bankruptcy Rules, 1886, notice of the time and place of the hearing shall be sent to every creditor not less than fourteen days before the day appointed. By Rule 184 of the Bankruptcy Rules, 1886, appeals to the Court of Appeal shall be regulated by Order LVIII. of the Rules of the Supreme Court, 1883, and by Order LVIII. Rule 2, "The notice of appeal shall be served upon all parties directly affected by the appeal."

[CAVE, J.: Has the official receiver been served ?]

The official receiver has been served but the creditors have not, and an appeal is not to be brought affecting parties to an appeal except in their presence.

[CAVE, J.: The other creditors are not affected by this appeal.]

If your Lordships think there is nothing in that point I shall not try to support the order. Let it go.

CAVE, J.:

Judgment. I think you are right. This order cannot be supported. It will not do at all. The appeal must be allowed and the case must go back to the County Court judge to rehear, with an expression of our opinion that he cannot make an order excepting any particular class of creditors. The costs of the appellant must come out of the estate.

CHARLES, J.:

I am of the same opinion.

Appeal allowed.

Solicitors : *A. Engel*, for the creditor.

Field, Roscoe & Son, agents for *B. Matthews & Son*,
Cardiff, for the bankrupt.

PRACTICE.

IN RE MORGAN, EX PARTE MORGAN.

*Bankruptcy Act, 1883, section 55.**Disclaimer of Lease—Vesting Order—Application by Original Lessee—Discretion of Court as to Respondents.*

COURT OF
APPEAL,
BEFORE THE
MASTER OF
THE ROLLS,
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February 22.

Section 55, sub-section (6) of the Bankruptcy Act, 1883, provides that “The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.”

Held: That on application under the section it is in the discretion of the Court what persons from among those claiming interest or under liability should be made respondents to the application; and if at the hearing the Court is of opinion that any of such persons who have not been served with notice ought to have an opportunity of being heard it may direct service to be made.

Where the property disclaimed is of a leasehold nature it will always be prudent until the question raised and not settled in *In re Finley, Ex parte Hanbury* (see *ante*, Vol. 5, p. 248; L. R. 21 Q. B. D. 475) has been decided, that notice of the application should be served on the lessor.

THIS was an appeal on behalf of *John Morgan* from an order of Mr. Registrar Hazlitt refusing an application made by him that one *Ward*, who was the mortgagee of certain leasehold property, should declare his option to accept a vesting order under section 55, sub-section (6) of the Bankruptcy Act, 1883.

Section 55 which deals with the disclaimer of onerous property by the trustee, provides by sub-section (6) that “The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such

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persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose: Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates incumbrances and interests created therein by the bankrupt."

The appellant *J. Morgan* was the original lessee of the property in question from one *Baynton*; and in 1879 *J. Morgan* executed an assignment of the property to one *Evans*. *Evans* subsequently assigned to *M. C. Morgan*, the bankrupt, who mortgaged the property by sub-demise to *Ward*.

The trustee in the bankruptcy finding the property to be an onerous one with a heavy rent and mortgage upon it applied for leave to disclaim and did disclaim; and *Baynton* the landlord thereupon sued *J. Morgan*, the original lessee, on the covenants in the lease and compelled him to pay certain rent which had become due.

Application was consequently made by *J. Morgan* that *Ward* the mortgagee should elect to take the property subject to its liabilities

or that he should be barred from all interest in it, but this application was refused by the registrar.

From that refusal, *J. Morgan*, the original lessee, now appealed.

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Yate Lee: for the original lessee.

J. Morgan is a person under liability with regard to the property disclaimed and he asks that *Ward*, who has possession of the property, shall either take a vesting order or shall be barred. There are two recent cases on this section. In *In re Cock, Ex parte Shilson* (see *ante*, Vol. V., p. 14; L. R. 20 Q. B. D. 343) "Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was at the same time ordered, on the application of the landlord, that unless the executor of a mortgagee by sub-demise of the bankrupt's interest, should within seven days elect to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property. It was held that the Court had power to make the order on the application of the landlord; and that, subject to a formal amendment making it clear that a vesting order might be taken as to all or none or any one or two of the leases, the order made was right." And in the judgment in that case the Court said "Let us see how the case will work out in practice. A. grants a lease for 99 years at 100*l.* a year to B., who assigns to C., who in consideration of an advance of 2,000*l.* demises to D. for the residue of the term except three days at a peppercorn. C. becomes bankrupt and his trustee wishing to disclaim brings A., B. and D. before the Court. A. cannot apply for a vesting order or a delivery order because he is not entitled to the property, nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and if he declines to take a vesting order that he may be excluded and a vesting order made in favour of him B. The same thing occurs where C. is the lessee and B. is only a surety for him." And further "Until the sub-lessee has declined to take a vesting order, the Court has no power to make a vesting order either in favour of the original lessee or of the surety for the bankrupt if there is one; and consequently if

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the power could only be exercised upon an application by the sub-lessee, it would remain a dead letter, for the sub-lessee never would have any interest in making such an application, and the person liable jointly with the bankrupt or alone could not get a vesting order until the sub-lessee had declined. Where all the parties are before the court upon an application for leave to disclaim, the vesting order may at once be offered to the sub-lessee and, on his refusal, may be granted to the surety or original lessee, or, if there is no person liable alone or jointly with the bankrupt, an order for a vesting order and for delivery of possession, or for a vesting order only, as the circumstances may require, may be made in favour of the lessor. Where no leave to disclaim is required and consequently the parties interested in the property disclaimed or liable to perform the covenants of the lease are not brought before the Court by the trustee, we are of opinion that the person liable to perform the covenants, or in the absence of such person, the lessor may bring the sub-lessee before the Court, and ask for an order for his exclusion, and for a vesting order or for delivery of the property if the sub-lessee refuses himself to take a vesting order." What was there said just applies to this case, and I can see no distinction. Then in the case of *In re Finley, Ex parte Hanbury* (see *ante*, Vol. V., p. 248; L. R. 21 Q. B. D. 475) the Court of Appeal approved the case I have cited and held "That where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by sub-demise, the Court has power under section 55 of the Bankruptcy Act, 1883, to make an order on the application of the original lessor excluding the sub-lessee from all interest in and security upon the property unless he elects to take a vesting order vesting the property in him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition. But *quære* whether if such a vesting order is made the sub-lessee will become liable as if he were an assignee, or whether he will become liable under the original lease as if he had been the original lessee." In this case the objections taken before the registrar were (1) that the application must be made at the time when leave to disclaim is given. I do not think that will now be contended. (2) That all parties were not before the Court.

Only the applicant *J. Morgan* and *Ward* were before the Court. The lessor was not before the Court, but he is an uninterested person.

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[*Fry, L. J.* : That is hardly so if it is an open question that his right against the original lessee is gone.]

At any rate the persons absent were not hurt by being absent. There is nothing in the Act of Parliament which says they are to be there. The suggestion is that the landlord and the mesne assignees are all to be served with notice of such an application. But no real objection was taken that the lessor was not there, but it was objected that *Evans* was not present. (3) It was said that there was no privity between *Ward* and *J. Morgan*. I must confess I do not understand what that means. (4) It was said that nobody could make the application except *Evans*.

F. C. Willis : for the respondent *Ward*.

I really only raise two points. I say first that *Evans* was a necessary party to be before the Court. The Court does not grant leave to disclaim unless every person interested is before it. Where there are a number of liabilities they ought to be heard to compete as to whom the property should be handed over. If they are not there the rights of persons who are not before the Court are interfered with.

[*THE MASTER OF THE ROLLS* : The section says "on hearing such persons as it thinks fit" not "on hearing all persons," and that would seem to be rather against your contention.]

At any rate I say that *Evans* ought to have been there. *J. Morgan* can sue *Evans* on the covenants under the assignment, and the right of *Morgan* is to sue him, *Morgan* himself having been sued by the landlord. Moreover in this case there is no privity between *Morgan* and *Ward*.

Yate Lee : in reply.

As a matter of fact I am informed that *Evans* is dead and

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that he has no executors or administrators. His estate was insolvent. I have, however, no proof of these facts. None of the persons interested or under liability could be hurt by what was done.

[THE MASTER OF THE ROLLS: The point taken was that every person must be served. But if the registrar thought that *Evans* ought to have been present it seems to me that he was entitled to have him there "if he thought fit."]

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case an application having been made to the registrar under section 55, sub-section (6) of the Bankruptcy Act, 1888, objection was taken that the first assignee of the lease, viz. *Evans*, was not before the Court, and the registrar upon that has declined to make the order. I confess I do not think the point was clearly stated to the registrar and I am not at all certain as to what was contended before him. If it was contended that it was a condition precedent to the registrar's dealing with the application that *Evans* ought to be served that is one thing. If it was suggested that *Evans* was a person who in the discretion of the registrar he ought to have before him that is another point. I cannot find out which point was put before the registrar. If the suggestion was that it was a condition precedent to the registrar's right to enter upon the application, it follows that everybody in the same position as *Evans* ought to be served and however many assignees there may be they must be served or inability to serve them must be proved. If it was suggested that it was advisable that the registrar should have *Evans* before him that is another view of the matter. I do not think the first objection is maintainable. It is not a condition precedent to the hearing of such an application as this that every person should be served. The only condition precedent is that the person against whom the application is to be made shall have the opportunity of being present. But when the application is made I have no doubt that the registrar has a right to insist that as many persons as he thinks fit shall be brought before him. If that is so the person who makes the application and who only serves the person against whom the application is made runs the risk of

not having served all the persons whom the registrar may think ought to be before him and he is in danger of having to pay costs in respect of his not having brought them before him. If he was in fault for not having served other persons who in the opinion of the registrar it is necessary to have before him, I doubt not that the registrar can make him pay costs. In this case as I have said I do not know what point was taken before the registrar. Therefore having stated my view of the meaning of the statute I can only deal with this case in a particular way. We are bound to consider I think that the registrar did the nearest thing to what was right. We ought to think that the registrar considered that Evans was a person whom he ought to see. If Evans is alive he may be served with notice of the application. If, as is suggested, he is dead his executors if he has left any may have notice given to them. We have agreed upon an order which we think is most likely to save expense and which my brother BOWEN will read.

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BOWEN, L.J. :

This case comes out clear in the end I think, and the order we have made will do justice and save expense. With regard to the section, the law stands thus. Application may be made to vest property in some person and this property is a property in which other persons may have and must have an interest and there are various persons under the Act who may apply as to such vesting. Those persons are described :—"On application by any person either claiming any interest in the disclaimed property or under any liability in respect to it." Now it is obvious that in the case of a lease many persons may claim an interest or be under some liability, and all those persons can apply for a vesting order. All the persons have a right to compete. *Prima facie* the Court will not make an order vesting property in one out of a class of persons having a right to it without having the others before it. But it is obvious that when we are dealing with a lease, which may perhaps be for 99 years, if one insists on the rigid rule of having everybody served who may be under any liability or who has any interest the expense would be enormous and what was done would be barren of fruit. A large number of those persons would not care what the Court did on the application. So what does the

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statute do? It says that the Court may make an order "on hearing such persons as it thinks fit." If the registrar sees that the interest of some person who is not before him might be affected he may say that he ought to be served. But if the registrar thinks that such a person may be disregarded he may pass over the technical difficulty of the presence of parties and may deal broadly with the question. The person applying really leaves himself to the discretion of the registrar and if the applicant does not serve enough persons he runs the risk of the registrar saying that he ought to have served such and such a person. Up to the hearing the applicant is left free to do what he thinks right and to exercise his own discretion as to who he shall serve. In this case the registrar thought that Evans ought to be there or that some account ought to be given of his absence. There is no real proof that Evans is dead and the registrar thought that Evans was a person who had a right to compete if he liked for this vesting order. That seems to have been what took place though I agree with the Master of the Rolls that we are left in great doubt. Now the case comes before us and I do not think we ought to overrule the discretion of the registrar with regard to Evans. So I think we ought not to allow this vesting order without giving Evans an opportunity to come in. If he is dead he of course cannot do so, but there is no proof before us of that. So with regard to the lessor. It would be prudent and just that the lessor should have an opportunity to come in too especially in view of the question raised and not settled in *In re Finley, Ex parte Hanbury* (see *ante*, Vol. V., p. 248). I doubt myself whether he will come in but an opportunity should be given to him to do so. The order we have agreed upon is as follows:—"Order in terms of motion. Costs below to be the applicant's costs. No costs here. Order not to be drawn up for a month. Notice to be given forthwith by the solicitors of the applicant to the lessor and to Evans or his personal representatives (if any). An affidavit of service or of facts which will excuse such service to be lodged with the registrar within a fortnight. Liberty reserved to the lessor and to Evans or his personal representatives (if any) to apply to this Court to rescind or vary this order. Such application to be made (if at all) before this day month."

FRY, L.J.:

I agree. It is plain from the words of the section that the Court is to determine who is to be heard as respondents. That vests a discretion in the Court as to who should be heard. There are two classes of persons who may be selected, those claiming an interest and those under any liability, any person in each of which classes may claim to have the property vested in him, and if one comes forward it may be reasonable that some or all the other competitors should be before the Court when the vesting order is asked for. The Court can only make the vesting order once. How many of the persons necessary to be before the Court must be a question of discretion in each particular case. The lessor is a person interested and he may have a substantial interest in discussing the point referred to in the case of *In re Finley, Ex parte Hanbury* (see *ante*, Vol. V., p. 248). In my judgment all we can say is that the number of respondents to be heard is in the discretion of the Court, and the nature of the jurisdiction shows that they must be one of those two classes. Evans was one of those two classes and might have been served and so is the lessor.

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—
IN RE
MORGAN,
EX PARTE
MORGAN.

THE MASTER OF THE ROLLS:

It follows from what has been said that until the point raised in *In re Finley, Ex parte Hanbury* (see *ante*, Vol. V., p. 248) is decided it will always be prudent to serve the lessor.

Order accordingly as above.

Solicitors : *Daniel Jones & Linnett*, for the original lessee.

Pedley & Bartlett, for the mortgagee.

Cases referred to :—

In re Cock, Ex parte Shilson, see *ante*, Vol. V., p. 14; L. R. 20 Q. B. D. 343; 57 L. J. Q. B. 169; 58 L. T. 586; 86 W. R. 187.

In re Finley, Ex parte Hanbury, see *ante*, Vol. V., p. 248; L. R. 21 Q. B. D. 475; 57 L. J. Q. B. 626; 87 W. R. 6.

PRACTICE.

DIVISIONAL
COURT.

BEFORE THE
LORD

CHIEF JUSTICE

AND
CAVE, J.
1888.

Nov. 6th,
1889.

Feb. 2nd.

IN RE HOLLINSHEAD, EX PARTE HEAPY & SON.

Bankruptcy Act, 1883, section 4, sub-section 1 (a).

Act of Bankruptcy—Deed of Assignment—Unstamped and Unregistered—Right to use Deed as Evidence of Act of Bankruptcy—Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), section 5, and section 17.

A deed of assignment for the benefit of creditors may be given in evidence as proof of an act of bankruptcy although neither stamped nor registered in accordance with the provisions of section 5 of the Deeds of Arrangement Act, 1887.

THIS was an appeal from an order of the registrar of the Macclesfield County Court by which he dismissed a bankruptcy petition presented against the debtor *Hollinshead* by Messrs. *Heapy & Son* on the ground that the act of bankruptcy relied upon had not been proved.

The act of bankruptcy alleged was that specified in section 4, sub-section 1 (a) of the Bankruptcy Act, 1883, viz., that the bankrupt had executed a deed of assignment of his property for the benefit of his creditors.

The deed was tendered to the registrar and proved to be neither stamped nor registered as required by section 5 of the Deeds of Arrangement Act, 1887.

The registrar thereupon dismissed the petition and from that order the petitioning creditor now appealed.

Kent: for the petitioning creditors.

Section 5 of the Deeds of Arrangement Act, 1887, provides that "From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then

within seven clear days after the time at which it would in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and ad valorem stamp as is under this Act provided." The registrar said that he could not regard this deed as evidence on which he could act because it was not stamped or registered. But by section 17 of the Deeds of Arrangement Act it is provided that "Nothing contained in this Act shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to bankruptcy, or shall give validity to any deed or instrument which by law is an act of bankruptcy, or void or voidable." It is clear also that a deed may be given in evidence as an act of bankruptcy though un-stamped. In *Ponsford v. Walton* (L. R. 3 C. P. 167 : 37 L. J. C. P. 113 : 17 L. T. 511 : 16 W. R. 363) it was held that "A deed of assignment under the Bankruptcy Act, 1861, Schedule D, may be given in evidence as proof of an act of bankruptcy, though neither stamped nor registered; and notice of the execution of the deed is notice of an act of bankruptcy." And in *Ex parte Squire, In re Gouldwell* (L. R. 4 Ch. App. 47 : 88 L. J. Bank. 13 : 19 L. T. 272 : 17 W. R. 40) it was held that "An assignment of the whole of a debtor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, though unstamped and not registered under the Bankruptcy Act, 1861." (Counsel also referred to *Siggers v. Evans*, 5 E. & B. 367 : 24 L. J. Q. B. 705 ; *Gowan v. Wright*, L. R. 18 Q. B. D. 201 : 56 L. J. Q. B. 181 : 35 W. R. 297.)

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HEAPY & SON.

The debtor was not represented.

The case was heard on November 6th last and judgment was now given by Mr. Justice CAVE.

February 2nd.

CAVE, J.:

This is an appeal from an order of the registrar of the County Judgment Court at Macclesfield dated June 12th, 1888, dismissing a petition

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IN RE

HOLLINSHEAD,

EX PARTE

HEAPY & SON.

for adjudication against Hollinshead on the ground that the act of bankruptcy relied on had not been proved.

The act of bankruptcy was a deed of assignment of all Hollinshead's property executed by him on April 12th, 1888, in favour of one Iberson as a trustee for the benefit of Hollinshead's creditors. The deed was not stamped nor was it registered pursuant to section 5 of the Deeds of Arrangement Act, 1887, and on these grounds the registrar held that the deed was void and dismissed the petition.

Section 5 of the Deeds of Arrangement Act provides that from and after the commencement of the Act (January 1st, 1888) a deed of arrangement to which the Act applies (which includes a deed of assignment, made by a debtor for the benefit of his creditors) shall be void unless the same shall have been registered under the Act within seven clear days after the first execution thereof and unless the same shall bear such ordinary and ad valorem stamp as is under the Act provided.

The deed in question was neither registered nor stamped. The registrar held that the deed was void under this section and consequently that the debtor had not made an assignment of his property to a trustee for the benefit of his creditors within the meaning of section 4, sub-section 1 (a) of the Bankruptcy Act, 1883.

It is unnecessary for us to consider what the effect of section 5 of the Deeds of Arrangement Act, 1887, would have been if it had stood alone, for by section 17 of the same Act (which does not appear to have been brought to the notice of the registrar) it is enacted, that nothing contained in that Act shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to bankruptcy. Now it is clear that but for section 5 of the Act of 1887 this deed would be an act of bankruptcy within section 4 of the Bankruptcy Act of 1883, and as by section 17 of the Act of 1887 nothing contained in that Act is to affect any provision of the law in force in relation to bankruptcy, it follows that the deed is an act of bankruptcy, and that the order dismissing the petition was wrong. The order of June 12th, 1888, must be set aside and a receiving order made, and the appellant must have his costs of the proceedings before the registrar out of

the estate. There will be no costs of the appeal, as it would appear that section 17 of the Act was not brought to the attention of the registrar.

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HOLLINSHEAD,
EX PARTE
HEAPY & SON.

Appeal allowed.

Solicitor: *John Hands*, agent for *P. S. Levy*, Liverpool, for the petitioning creditors.



BEFORE
MR. JUSTICE
CAVE.
1889.

Jan. 12th and
14th.

February 11th.

IN RE TILLETT, Ex PARTE KINGSCOTE.

Bankruptcy Act, 1883, sections 44 and 49.

Order and Disposition—Book Debts—Appointment of Receiver—Notice of Assignment.

By an order dated May 14th, 1887, by which the plaintiff obtained final judgment in an action, a receiver was appointed to carry on the business of the defendant, and to collect and get in outstanding debts.

By a further order dated December 20th, 1887, the order of May 14th, 1887, was rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the receiver was to continue to act for the plaintiff with power to issue to any of such book debtors a circular in prescribed form: and it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to and accepted by the plaintiff in satisfaction of his judgment debt interest and costs: and after giving the defendant power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by the defendant on or before March 31st, 1888, the plaintiff should be at liberty to give notice of the order of May 14th, 1887, and of that order in the form prescribed in the second schedule, to each of the debtors mentioned in the said first part and to collect and recover such debts in his own name.

On February 13th, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of December 20th, 1887, a notice requiring payment and stating that the defendant's firm were "closing up accounts with a former member," and that it was "necessary to collect all outstanding debts."

On February 23rd, 1888, the defendant in the action committed an act of bankruptcy upon which a petition was presented against him.

On April 4th, 1888, the plaintiff without knowledge of the act of bankruptcy or of the petition, sent to the debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver and the assignment.

In May, 1888, the debtor was adjudicated bankrupt and the trustee claimed the scheduled debts.

Held: That the order appointing the receiver did not constitute the plaintiff a secured creditor: that the order of December 20th, 1887, transferred the book debts to the plaintiff but left them in the order and disposition of the bankrupt without notice: and that although the debts in the first part of the schedule were taken out of the order and disposition clause by the notice of April 4th, 1888, those contained in the other three parts of the schedule were in the order and disposition of the bankrupt at the time of the bankruptcy, the notice sent out by the receiver on February 13th, 1888, being insufficient.

THIS was an application on behalf of one *Kingscote* for an order declaring that he was entitled as against Mr. *Harper*, the trustee

in the bankruptcy of *Tillett*, to certain book debts specified in the schedule to an order of the High Court dated December 20th, 1887.

The applicant *Kingscote* formerly carried on business as a wine merchant in St. James's Street and other places in London under the style of *Barton & Co.*; and in October, 1885, an agreement was entered into by him with *Tillett*, that *Tillett* should purchase this business, certain arrangements being then made between them under which *Kingscote* was to receive by instalments the amount of the capital which had been invested by him or his friends in the business.

These instalments were not duly paid and in April, 1887, an action was brought by *Kingscote* against *Tillett* and an order for final judgment obtained for 14,566*l.* 11*s.* 11*d.* and costs.

By the same order which was dated May 14th, 1887, the plaintiff *Kingscote* was restrained from issuing execution without the leave of the Court and one *Kemp* was appointed receiver of the business, to manage carry on and work the business in conjunction with the defendant *Tillett* and to collect and to get in the outstanding debts belonging to the business. It was further ordered that the defendant *Tillett* should deliver up possession of the business to *Kemp*.

On September 15th, 1887, disputes having arisen between *Tillett* and *Kemp* an order was made discharging *Tillett* from the joint management of the business and appointing *Kemp* sole manager thereof in his place and restraining *Tillett* from in any way interfering with him in the carrying out of his duties as receiver and manager.

On September 27th, 1887, it was ordered that no circular should be issued to the customers of the business by the receiver unless first approved of by *Tillett*, and that in case the terms of the circular could not be agreed on the same should be settled by the judge.

On October 4th, 1887, it was ordered that the receiver should be at liberty to issue to all the customers whose accounts ought to have been rendered in June previous a circular in the following terms:—

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BANKRUPTCY REPORTS.

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IN RE
TILLETT,
EX PARTE
KINGSCOTE.

DEAR SIR,

We shall be much obliged if you will forward us a cheque for the amount due from you on or before the day of October next, as we are closing up accounts with a former member of this firm, and it is necessary to collect all outstanding debts.

Yours faithfully,
BARTON & CO.

On October 13th, 1887, an application by Mr. *Kingscote* for leave to give notice to the book debtors of the appointment of the receiver was refused. But on December 20th, 1887, an order of the Court was made by which it was ordered that the order of May 14th, 1887, should be rescinded except as regarded the book debts mentioned in the four parts of the First Schedule, as to which the order was to stand and as to which Mr. *Kemp* was to continue receiver for the plaintiff under that order with power if and when he should consider necessary to issue to all or any of such book debtors at or after the time when their accounts respectively became due to Barton & Co. a circular in the form mentioned in the order of October 4th, 1887. And it was further ordered that the whole of the book debts mentioned in the four parts of the First Schedule should be allocated to and accepted by the plaintiff *Kingscote* in satisfaction of his judgment debt, interest and costs. And it was further ordered that if any of such book debts were at any time paid to the defendant *Tillett*, the defendant should immediately pay over the said sums to the receiver who should pay them over to *Kingscote* within seven days, and further should pay to the defendant if and when received by the receiver any sum or sums in excess of the respective amounts mentioned in the four parts of the Schedule. And after giving the defendant power to redeem any of the book debts in the Schedule by payment to the plaintiff of the amount thereof, it was further ordered that in case any of the book debts mentioned in the First Part of the First Schedule should not have been paid by the respective debtors or redeemed by the defendant on or before March 31st, 1888, the plaintiff at the expiration of such period should be at liberty to give notice of the said order of May 14th, 1887, and of that order in the form mentioned in the Second Schedule, to each of the said debtors mentioned in the said First Part whose schedule debts had not on or before that time been paid by the debtor or redeemed by

the defendant and to collect, get in and sue for in the plaintiff's name and recover the respective amounts of such debts and to give such debtors a valid discharge for the same.

The Second Schedule was as follows :—

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1887, K. No. 347.

In the High Court of Justice,
Queen's Bench Division,
Between Thomas Fitzhardinge Kingscote—Plaintiff,
and
Francis Tillett—Defendant.

Take notice that by orders of Divisional courts of the Queen's Bench Division of the High Court of Justice, made in this action on the 14th May, 1887, and the 20th December, 1887, Charles Fitch Kemp, of 8, Walbrook, in the City of London, was appointed Receiver to collect and get in certain of the book debts scheduled to the last mentioned order belonging to the business of a wine merchant carried on by the defendant at 59, St. James's Street, Piccadilly, in the County of Middlesex, and at 17, Gracechurch Street, and at St. Mildred's Court both in the City of London under the style of Barton & Co., and that such scheduled book debts included your debt of £ : and it was further ordered that the plaintiff be at liberty at the expiration of certain periods in the said order mentioned (which as to your debt has now expired) to give this notice to each of the said debtors, and to collect get in and sue for in his own name and recover the respective amounts of such scheduled debts, and to give valid discharges for the same : and further take notice that unless the said sum of £ , the amount of your said debt is paid to us on or before next the day of 18 , we shall take proceedings to recover the same.

Yours, &c.,
STEVENS, BAWTREE & STEVENS,
Plaintiff's Solicitors.

On February 13th, 1888, Mr. *Kemp* the receiver sent to the debtors mentioned in the First Schedule of the order of December 20th, 1887, a notice in the form authorised by that order and the order of October 4th, 1887.

On April 4th, 1888, Messrs. *Stevens, Bawtree & Stevens*, the solicitors to Mr. *Kingscote* sent to the debtors whose names were mentioned in the First Part of the First Schedule a notice in accordance with the form contained in the Second Schedule to the order of December 20th, 1887.

In the meantime, however, viz., on February 23rd, 1888, *Tillett* committed an act of bankruptcy, upon which a petition was presented against him and a receiving order made on May 5th, 1888.

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The trustee in the bankruptcy refused to acknowledge the claim of Mr. *Kingscote* to the scheduled debts, on the ground that they belonged to the bankrupt at the time of his bankruptcy, or that if they then belonged to *Kingscote* they were in the order and disposition of the bankrupt with the consent of *Kingscote* as the true owner.

Mr. *Kingscote* now applied to the Court for a declaration in his favour.

Crump, Q.C. (Herbert Reed and Banks with him): for Mr. *Kingscote*.

The debts which were allocated to the applicant by the order of December 20th, 1887, amounted to something like 14,000*l.* which was the balance of the purchase-money then due to him. These debts did not belong to the bankrupt at the time of his bankruptcy. The effect of the order was to vest the debts in *Kingscote*. They were in the order and disposition of the bankrupt but that was not with the consent of Mr. *Kingscote*. Further they were taken out of the bankrupt's order and disposition by the notices which were given to the debtors. One notice was given on February 18th, 1888, by the Receiver to the debtors mentioned in the first schedule. Another notice was given on April 4th, 1888, by Mr. *Kingscote* to the debtors whose names appeared in the first part of the first schedule. That was after the committing of the act of bankruptcy but before the making of the receiving order, and Mr. *Kingscote* had no knowledge whatever of any act of bankruptcy. Moreover the debts in the second, third and fourth parts of the schedule were not in the order and disposition of the bankrupt with the consent of the true owner, because Mr. *Kingscote* was prevented by the Court from giving notice to the debtors of the assignment of December 20th. (Counsel referred to *In re Dickenson, Ex parte Charrington & Co.*, see *ante*, p. 1; *Whinney v. Colonial Bank*, L. R. 11 App. Cas. 426 : 56 L. J. Ch. 48 : 55 L. T. 362 : 34 W. R. 705 ; *Reynolds v. Bowley*, L. R. 2 Q. B. 474 ; *Ex parte Brett, In re Irving*, L. R. 7 Ch. Div. 419 : 47 L. J. Bank. 39 : 37 L. T. 507 : 26 W. R. 376 ; *Ex parte Arnold, In re Wright*, L. R. 3 Ch. Div. 70 : 45 L. J. Bank. 130 : 24

W. R. 977 ; Kerr on Receivers, p. 118 ; Fisher on Mortgages, 3rd ed. p. 415.)

Muir Mackenzie (*R. T. Reid, Q.C.* and *Sidney Woolf* with him) : for the trustee in bankruptcy.

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This is really an attempt to do that which the case of *In re Dickenson, Ex parte Charrington & Co.* (see *ante*, p. 1) says shall not be done, viz.—to try to take advantage of an imperfect execution. The case of *Manchester and Liverpool District Banking Company v. Parkinson* (37 W. R. 264) shows that the principle laid down in *In re Dickenson, Ex parte Charrington & Co.* (see *ante*, p. 1) applies not only to chattels but also to book debts. The appointment of a receiver was obtained for the purpose of getting the benefit of an execution which could not be obtained in the ordinary way. But assume that the order of December 20th was an assignment the notice of February 13th did not take the debts out of the reputed ownership of the debtor but actually kept them in. If there was an assignment it was altogether misleading to give notice to pay to the assignor. What I contend is that the order of December 20th was not an assignment but merely an attempt to get the benefit of an execution without its perils. But if there was an assignment the want of notice renders it inoperative as to the second, third and fourth parts of the schedule. And as to the first part of the schedule I say that the notice of April 4th was not sufficient. It was after the act of bankruptcy. (Counsel also referred to *Ryall v. Rowles*, 1 Ves. 3481 : 1 Wh. & Tud. Lead. Cas. 6th ed. at pp. 857, 861 ; *Jones v. Gibbons*, 9 Ves. 407 ; *In re Styman, Ex parte Smith*, 2 M. D. & De G. 213, 219.)

February 11th.

CAVE, J.:

This is an application by Mr. Kingscote for an order declaring Judgment that he is as against the trustee of the bankrupt entitled to the book debts specified in the schedule to an order of the High Court of December 20th, 1887 ; also to four other book debts amounting to the sum of 2719*l.* 13*s.* 5*d.* In the course of the argument it was admitted by Mr. Kingscote's counsel that he could not sustain

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his claim to these last-mentioned debts. The trustee resists the claim to the scheduled debts on the ground that they belonged to the bankrupt at the time of his bankruptcy; or that if they then belonged to the applicant they were in the order and disposition of the bankrupt with the consent of the applicant as the true owner thereof. The applicant denies that these debts belonged to the bankrupt at the time of his bankruptcy. He admits that they were in the order and disposition of the bankrupt at the time of his bankruptcy but contends that this was not with his consent, and also alleges that after the committing of the act of bankruptcy, but without notice thereof, and before the making of the Receiving Order they were taken out of the bankrupt's order and disposition by two notices, one of which was given to the debtors on or about February 13th, 1888, and the other on April 4th, 1888.

Prior to the month of October, 1885, Mr. Kingscote carried on the business of a wine merchant at 59, St. James's St., and at other places in London under the style of Barton & Co. and in that month it was agreed between Mr. Kingscote and Tillett who had up to that time been in Kingscote's employ as a book-keeper that Tillett should purchase the business, and certain arrangements were entered into between them under which Kingscote was to receive by instalments the amount of the capital which had been invested by him or his friends in the business. Tillett had been able to bring little or no capital into the business and it is very doubtful whether it was not insolvent at the time when he purchased it. Under these circumstances the instalments were not duly paid and in April, 1887, Kingscote brought an action against Tillett and on May 14th following obtained an order for final judgment for 14,566*l.* 11*s.* 11*d.* and costs. By the same order the plaintiff was restrained from issuing execution without the leave of the Court and one Kemp was appointed receiver of the business to manage, carry on and work the business in conjunction with the defendant Tillett, and to collect and to get in the outstanding debts belonging to the business. It was further ordered that the defendant Tillett should deliver up possession of the business to *Kemp*. This order does not purport to have been made by consent but I am satisfied that it was the result of a compromise, and that the object of appointing a receiver was to obtain security on the busi-

ness and especially on the book debts for the amount of the judgment in the not improbable event of the defendant subsequently becoming a bankrupt. No notice of this order was given by Kingscote to the debtors of defendant. On September 15th, 1887, disputes having arisen between Tillett and Kemp an order was made discharging Tillett from the joint management of the business and appointing Kemp sole manager thereof in his place, and restraining Tillett from in any way interfering with Kemp in the carrying out of his duties as receiver and manager. On September 27th, 1887, it was ordered that no circular should be issued to the customers of the business by the receiver unless first approved of by Tillett, and that in case the terms of the circular could not be agreed on the same should be settled by the Judge.

On October 4th, 1887, it was ordered that the receiver should be at liberty to issue to all the customers whose accounts ought to have been rendered in June previous a circular in the following terms : " Dear Sir,—We shall be much obliged if you will forward us a cheque for the amount due from you on or before the day of October next as we are closing up accounts with a former member of this firm and it is necessary to collect all outstanding debts. Yours faithfully, Barton & Co." Shortly after this in consequence of threats made on behalf of one of the creditors of the firm, a summons was issued by Kingscote for leave to give notice to the book debtors of the appointment of the receiver but the application was refused on October 13th, 1887.

On December 20th, 1887, an order of the Court was made by which it was ordered that the order of May 14th, 1887, should be rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the order was to stand, and as to which Kemp was to continue receiver for the plaintiff under that order with power if and when he should consider necessary to issue to all or any of such book debtors at or after the time when their accounts respectively became due to Barton & Co. a circular or circulars in the form mentioned in the order of October 4th, 1887. And it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to and accepted by the plaintiff in satisfaction of his judgment debt, interest and costs ; and it was further ordered that

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if any of such book debts or any part or parts thereof were at any time or times paid by or on behalf of the debtors to the defendant by cheque or otherwise the defendant should within twenty-four hours of such payment pay over such cheques or other payment to Kemp the receiver, and that Kemp should pay over to the plaintiff each and every of the said book debts or any portion of such book debts within seven days of the date of payment thereof respectively and further should pay to the defendant if and when received by the receiver any sum or sums in excess of the respective amounts mentioned in the four parts of the schedule; and after giving the defendant power to redeem any of the book debts in the schedule by payment to the plaintiff of the amount thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by the defendant on or before March 31st, 1888, the plaintiff at the expiration of such period should be at liberty to give notice of the said order of May 14th, 1887, and of that order in the form mentioned in the second schedule, to each of the said debtors mentioned in the said first part whose schedule debts had not on or before that time been paid by the debtor or redeemed by the defendant and to collect, get in, and sue for in the plaintiff's name and recover the respective amounts of such debts and to give such debtors a valid discharge for the same.

The second schedule was as follows. [His Lordship read the schedule, see *ante*, p. 73.]

Although not so expressed this order was in fact made by the consent of the parties.

On or about February 13th, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of December 20th, 1887, a notice substantially in the form authorized by that order and the order of October 4th, 1887, and on April 4th, 1888, Kingscote's solicitors sent to the debtors whose names were mentioned in the first part of the first schedule a notice in accordance with the form contained in the second schedule to the order of December 20th.

In the meantime on February 23rd, 1888, Tillett had committed an act of bankruptcy upon which a petition was presented against him on February 27th, and after several adjournments a Receiving Order was made on May 5th, 1888.

Mr. Kingscote and his solicitors have sworn that they had not on April 4th any notice of the act of bankruptcy or of the petition, and although the fact is somewhat extraordinary no evidence has been laid before me which would justify me in disbelieving them and I accordingly accept their statement on the subject.

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These being the facts it is now necessary to apply the law to them. I have no doubt that Mr. Kingscote's advisers desired to obtain for him and thought they had obtained a security available in case of Tillett's bankruptcy by the order for a receiver of May 14th, 1887, but after the recent decision of the Court of Appeal in *In re Dickenson, Ex parte Charrington & Co.* (see *ante*, p. 1) it is clear that that order gave Mr. Kingscote no such security and that down to December 20th, 1887, the scheduled debts were the property of the bankrupt. The order of that date which as I have said was a consent order did I think transfer these book debts to Mr. Kingscote, but left them in the order and disposition of the bankrupt until notice of the assignment was given to the debtors. The notice of February 13th sent out by the Receiver is not to my mind notice of the assignment effected on December 20th. It is substantially in the form prescribed by the order of October 4th, 1887, which was made before these book debts had been agreed to be assigned to Kingscote and amounts to nothing more than a statement that some former partner in the firm had an interest in the proceeds of those debts which is quite consistent with the legal right to receive and deal with them remaining in the bankrupt. It is however otherwise with the notice of April 4th. That was framed for the express purpose of conveying to the debtors notice that the debts had been assigned to Kingscote, and although not given until after the act of bankruptcy had been committed yet as it was given without notice of that act I must hold in accordance with the chain of authorities cited by Mr. Reed that it was a protected transaction within the meaning of section 49 and operated to take the debts in the first part of the schedule out of the order and disposition of the bankrupt.

It was urged by Mr. Reed that the debts in the other three parts were not in the order and disposition of the bankrupt with the consent of the true owner Mr. Kingscote, because he was prevented by the Court from giving notice to the debtors of the

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assignment of December 20th, 1887. But Kingscote was only prevented from giving this notice by his own consent to that order, and it was only on the strength of his own consent to the terms of the order that these debts were assigned to him at all.

I must therefore declare that the debts in the first part of the schedule were not, but that those in the second, third, and fourth parts were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner.

A small subsidiary point was raised by the affidavit of Mr. Kingscote's solicitors filed on January 11th. It is stated that some of the debts scheduled were originally the property of Mr. Kingscote and had never ceased to be in his order and disposition. This point is of course immaterial so far as the debts in the first part are concerned, but if there are any such debts in the other parts and the parties cannot agree which they are I must direct an inquiry as to that point and in that case the costs of the inquiry will be reserved with liberty to apply.

As each party has succeeded to a substantial extent I do not think it right to make any order as to the costs of this motion except that the trustee may take his out of the estate.

Order accordingly.

Solicitors : *Stevens, Bawtree & Stevens*, for Mr. Kingscote.
Irvine & Hodges, for the trustee in bankruptcy.

IN RE BROWN, EX PARTE PLITT.

BEFORE
MR. JUSTICE
CAVE.
1889.

Bankruptcy Act, 1883, section 44.

Banker and Customer—Moneys entrusted “for collection”—Bankruptcy—Right to Payment out of Estate.

Although the ordinary relation between a banker and his customer is merely that of debtor and creditor, and not of trustee and cestui que trust; where moneys are entrusted to a banker to collect and remit a trust is created, and in the event of the bankruptcy of the banker before the moneys are remitted payment may be demanded out of the estate.

THIS was an application on behalf of *J. Plitt* for an order that the sum of 129*l.* 10*s.* being moneys received or collected by the bankrupt for the applicant might be paid to him out of the bankrupt's estate with costs.

The bankrupt *A. Brown* was a banker and money changer in Lombard Street, to whom the applicant *Plitt* had for some time been in the habit of going to obtain change for foreign moneys and to ask him to collect cheques on his account which he had received in his capacity of agent for persons abroad.

On April 3rd, 1888, *Plitt* received on behalf of his principals a cheque on the London Joint Stock Bank for the sum of 154*l.* 3*s.* 8*d.*, and on the same day he handed it to the bankrupt so that he might collect the same for him and hold it on his account, taking a receipt in which the cheque was stated to be “for collection.”

The bankrupt paid this cheque into his account at Barclay's Bank and received the amount, and on April 5th, 1888, he handed over to the applicant the sum of 4*l.* 18*s.* 6*d.*, and on April 13th, 1888, the sum of 19*l.* 5*s.* 2*d.*, leaving 129*l.* 10*s.* in the hands of the bankrupt at the date of the presentation of the petition against him on April 19th, 1888.

This sum was now claimed by the applicant out of the estate on the ground that the bankrupt had no property in the said money and that it was held by him only for safe custody as a trustee on his behalf.

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BROWN,
EX PARTE
PLITT.

Sidney Woolf: for Mr. Plitt.

The short question is that this is not a case of banker and customer at all. This was a sum of money received by the bankrupt for the purpose of collection. The money always remained *Plitt's* money. It is true that in the case of *In re West of England and South Wales District Bank, Ex parte Dale & Co.* (L. R. 11 Ch. Div. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815), "A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted the bank went into liquidation:—And it was held that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to the other creditors." But in the case of *In re Hallet's Estate, Knatchbull v. Hallett* (L. R. 13 Ch. Div. 696; 49 L. J. Ch. 415; 42 L. T. 421) it was held that "If money held by a person in a fiduciary character, though not as trustee has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands." And the late Master of the Rolls (Sir George JESSEL), and Lord Justice BAGGALLAY in that case considered the case of *Ex parte Dale & Co.* (L. R. 11 Ch. Div. 772) and dissented from it. Where a customer entrusts money to a banker simply for collection he is entitled on the bankruptcy of the banker to be paid.

[CAVE, J.: The law is pretty well settled now I think. Where the debtor is to collect and remit there is confidence and trust. Where the debtor is to use and repay on demand then there is no trust. Here part of this money appears to have been repaid in two sums on different dates. *Prima facie* that is inconsistent with a direction to collect and remit.]

Those sums were paid on account. The mere fact of drawing on account does not prevent the trust from taking place (Counsel also referred to *Ex parte Edwards*, 2 M. D. & De G. 625).

[The applicant *J. Plitt* was called as a witness and said :—“ The whole sum was not repaid because I did not then want the money. I asked the bankrupt to keep it for me in trust so that I need not take the money to my hotel. He paid me the first sum of 4*l.* 18*s.* 6*d.* because I wanted it for current expenses. I got the other sum of 19*l.* 5*s.* 2*d.* about eight days later to send off to Germany.”]

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IN RE
BROWN,
EX PARTE
PLITT.

Abrahams : for the trustee in the bankruptcy.

The real question seems to be what view the Court will take of the facts of the case. Was there a relation of trustee and cestui que trust at the date of the receiving order or was there a relation of debtor and creditor. The case of *In re Agra & Masterman's Bank, Ex parte Waring* (36 L. J. Ch. 151) shows that “ The ordinary relation between a banker and his customer is merely that of debtor and creditor, and not of trustee and cestui que trust.” This cheque was given for collection but after collection the moneys were left at the bank and the money was only held in trust on deposit just the same as a banker does for his customer. *Plitt* received two sums on account and it was an ordinary banking transaction. (Counsel also referred to *Ex parte Pease*, 1 Rose, 232.)

CAVE, J. :

I am of opinion here that the relation between the parties was Judgment. not the ordinary relation of banker and customer. Where that relation exists it follows that the banker can use the money of the customer and nothing is created but a debt from the banker to the customer. Here the case is a different one. The applicant *Plitt* says that he handed the cheque to *Brown* for *Brown* to receive and hold it for him. If so it is not the ordinary case of banker and customer. It is not necessary to consider whether *Brown* was justified in mixing it with his own money as he never allowed his account to run so low as to touch that. But if I take a five pound note to a man and ask him to take care of it for me, it does not justify him to employ that money and become my debtor. The case of a bank is otherwise where the bank uses the customer's money.

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Therefore I have come to the conclusion that the applicant is entitled to the money and I declare to that effect with costs.

Application allowed.

Solicitors : *J. A. Bartrum*, for the applicant.

M. Abrahams, Son & Co., for the trustee in the bankruptcy.



PRACTICE.

IN RE HESTER, EX PARTE HESTER.

Bankruptcy Act, 1883, section 18 and section 35.

Application to Rescind Receiving Order—Assent of Creditors—Proposal of Debtor—Scheme of Arrangement—Discretion and Duty of Court.

Where a receiving order has been made against a debtor and where there has not been payment of the debts in full and no suggestion is raised that such receiving order has been wrongly made, it is not sufficient in order to obtain a rescission of the receiving order for the debtor to collect the assents of his creditors to such rescission.

In order to move the Court to interfere in the matter the debtor ought to bring before it some clear ground for thinking that what is put forward other than a payment of the debts in full is a *bond fide* proposal which it will be in the interests of the creditors to uphold, and also one which is not detrimental to the public at large.

Such proposal must take the form of some scheme of arrangement, and, if that arrangement is not in substance the same as an arrangement which would satisfy the requirements of section 18 of the Bankruptcy Act 1883, the fact of the debtor not proceeding under that section must be carefully considered by the Court before it allows a receiving order to be annulled; although an absolute rule has not been laid down that where the scheme of arrangement which is proposed is equivalent to a scheme under section 18, and can be accepted with perfect safety, the Court is bound at once to reject the proposal because all the formalities of section 18 have not been fulfilled.

The question whether a receiving order ought to be set aside or not is a matter of discretion in each particular case, and the Court of Appeal will not interfere in such a matter unless it is clearly of opinion on all the facts that the discretion as exercised was wrong.

The case of *In re Dixon & Cardus, Ex parte Dixon & Cardus*, (see *ante*, Vol. V., p. 291), followed.

The case of *Ex parte Carr, In re Carr* (35 W. R. 150), explained.

THIS was an appeal on behalf of the debtor *F. Hester* from a decision of the Divisional Court in Bankruptcy refusing to direct that a receiving order which had been made against the said debtor in the County Court at St. Albans should be rescinded.

The debtor *Hester* carried on business as a builder, in the course of which he had dealings with one *Lavers* a timber merchant, who took from the debtor a bill of exchange for the sum of 142*l.* in respect of goods supplied by him.

COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
BOWEN, L. J.,
FRY, L. J.
1889.

March 1st.

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This bill was indorsed by *Lavers* to a person named *Dyer* in consideration, as it was alleged, of 51*l.* paid by *Dyer* to *Lavers* for the bill; and on October 4th, 1888, judgment was obtained by *Dyer* against *Hester* for the 142*l.* and costs.

On October 19th, 1888, a bankruptcy petition was issued by *Dyer* against *Hester* in the St. Albans County Court upon which a receiving order was made on November 6th, 1888.

During this time negotiations were taking place between the petitioning creditor and the debtor in respect of the judgment and the receiving order was in consequence not drawn up, but on November 20th, 1888, the county court registrar gave notice to the parties that unless such order was drawn up forthwith, he himself would draw it up which he accordingly did.

On November 29th, 1888, arrangements were made for the settlement of all disputes between *Dyer* and *Hester*, the creditor taking two acceptances for 26*l.* and 25*l.* respectively, together with 30*l.* in cash towards the costs of the bankruptcy proceedings, and on November 30th, satisfaction for the judgment was entered.

On December 3rd, 1888, application was made by *Hester* to the registrar with the consent of *Dyer* to rescind the receiving order, but the application was opposed by the official receiver and was refused.

Application was thereupon made to the registrar to restrain the advertisement in order that evidence of the consent of the creditors to the receiving order being rescinded might be obtained, arrangements having been already made with some of them.

This application was also refused by the registrar, but on December 13th, 1888, an order was obtained *ex parte* from Mr. Justice DENMAN, sitting as the Bankruptcy Judge during the absence of Mr. Justice CAVE on circuit, staying all proceedings until after the appeal against the receiving order had been disposed of.

On February 1st, 1889, the appeal from the refusal of the registrar to rescind the receiving order came before Mr. Justice CAVE and Mr. Justice CHARLES sitting as the Divisional Court in Bankruptcy when the consent of all the creditors was produced except of two who were alleged to be secured and of three creditors for a small amount whose address could not be found.

The Divisional Court dismissed the appeal and from that order the debtor now appealed to the Court of Appeal, leave having been given in consequence of certain expressions in the case of *Ex parte Carr, In re Carr* (35 W. R. 150).

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HESTER,
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Winslow, Q.C. (F. C. Willis with him) : for the debtor.

It was very doubtful whether *Dyer* was the real owner of the original bill. He accepted 51*l.* in full discharge of the judgment. When the case came before the Divisional Court the consents of the whole of the creditors to the receiving order being rescinded were produced except those of the London and County Bank and a Mr. *Stubbing* who were alleged to be secured, and of three small creditors for 8*l.* and 5*l.* whose address could not be found and against whom there was a set-off. There was power to rescind the receiving order and it ought to be rescinded. In *Ex parte Carr, In re Carr* (35 W. R. 150), it was held that "The registrar before rescinding the appointment of a receiver, or granting a stay of proceedings, is not bound to be satisfied that the consent of all the creditors has been obtained; but he must exercise his discretion as to the sufficiency of the consent obtained in each case. Pending such rescission or stay of proceedings the debtor should not, even with the consent of the petitioning creditors, be left in unfettered control of the estate; but a stay of the advertisement by the receiver may properly be granted." And the judgments in that case go far to show that where the consent of the creditors is obtained the receiving order ought to be rescinded. That case puts away all necessity for a scheme to be proposed. You cannot have a scheme of arrangement so long as the advertisement is stayed. There cannot be a meeting of creditors and without a meeting of creditors there cannot be a scheme of arrangement.

[*BOWEN, L.J. : Must you not satisfy the Court that the proposal made is one which will be to the interest of the creditors generally and will not result in a hopeless insolvency ?*]

The debtor need not go round to the creditors with a particular scheme, but he may get the assents of the creditors separately.

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[BOWEN, L.J. : Is there not a recent decision which practically covers the present case ?]

Your lordship is referring to *In re Dixon & Cardus, Ex parte Dixon & Cardus*, (see *ante*, Vol. V., p. 291). There it was held that "Section 18 of the Bankruptcy Act, 1883, was intended to indicate the general course of practice that after a receiving order has been made a bankruptcy shall go on in the ordinary way unless it is stopped by the effect of a composition or scheme of arrangement under that section ; and although an absolute rule has not been laid down that there is no possible scheme of arrangement or composition outside that on the footing of which the Court may not properly discharge the receiving order, yet the Court will not be willing to go beyond the usual course of practice and must be thoroughly satisfied of the necessity of doing so before it can entertain any application for a composition or scheme of arrangement outside section 18. Where after a receiving order had been made against the debtors on their own petition, a scheme was put forward by them which the creditors were willing to accept, and the debtors thereupon with the assent of the creditors, applied to have the receiving order rescinded on the ground that the proposed scheme of arrangement was not one which could be carried out under the provisions of the Bankruptcy Act. It was held that the application to rescind the receiving order was rightly refused ; and that if the debtors were desirous of substituting a scheme their proper course was to proceed in the manner provided under section 18 of the Bankruptcy Act, 1883." But there the debtors had presented their own petition. And there also it was proposed there should be a scheme.

[BOWEN, L.J. : I speak for myself, but what that case says to my mind is that the Court will not as a rule consider the consent of the creditors sufficient, but it will consider whether the scheme, proposal or plan put forward as the basis for rescinding the receiving order is for the benefit of the general body of the creditors, and it will be guided as a rule by the provisions of section 18, though it will not tie its hands.]

Sir Edward Clarke, Q. C., Solicitor-General (Muir Mackenzie with him) : for the Board of Trade were not called upon.

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THE MASTER OF THE ROLLS (LORD ESHER) :

It seems to me that there is hardly any colour at all for this Judgment appeal. If you take the case of *In re Carr* (35 W. R. 150) : I can see nothing wrong—nay, what is more, I can see nothing obscure in what is said in the judgment in that case. I cannot see it myself, but I dare say there is because Mr. Justice CAVE seems to have almost thought so. I think that what is laid down in *Carr's* case was this—that whether the Receiving Order shall be set aside or not is a matter of discretion, and where the Registrar has exercised his discretion, or where Mr. Justice CAVE, or the Divisional Court, has exercised its discretion, this Court will pause long before it interferes with that discretion. It does not seem to me to be obscure, and I think that *Carr's* case went further and said that in exercising the discretion the Court must have, in each case, all the facts before it, and then they will consider the facts in each case and say whether the discretion was or was not wrongly exercised. That does not seem to me to be wrong. I think that is right. Then you come to the case of *In re Dixon & Cardus* (see *ante*, Vol. V., p. 291), and that seems to me to say this : that where there is a Receiving Order and where there has not been payment in full—and where it is not suggested that the Receiving Order was wrongly made at the beginning—what is proposed less than a payment in full must be a scheme and must be an arrangement, and if that arrangement is not in substance the same as an arrangement which would satisfy section 18, looking at the fact of section 18 being there and of its being possible for the person to propose a scheme with all the formalities of section 18, it is a very strong matter to be considered against what he is proposing that he has not gone under section 18. It is a strong matter to consider, that instead of going under section 18, he proposes to the Court to annul the Receiving Order, and so take the hands of the Court off. I think that case did point that out, but I think the case said this, that if the scheme of arrangement which is proposed is equivalent to a scheme under section 18, and the Court can see its way to be perfectly safe, then at all events they would not decide that the proposition

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should be at once declined because the formalities of section 18 had not been fulfilled. I do not think it is necessary to decide that point now; it is sufficient to say that the question here is this:—The bankrupt has got he says the consent of all his creditors but three. But he has not got that consent in the way pointed out by section 18 by a meeting of all of them and a discussion. He does not propose to leave this arrangement under section 18. That is strong against him *prima facie*. But it is urged on his behalf that he has got the consent of all his creditors. What has he got their consent to? It is not pretended that he has got the consent of all of them to take payment in full, although they have all of them, it is said, signed receipts in full. Now if creditors without getting paid in full will sign a receipt in full, it requires to my mind very considerable explanation of how they came to do such an unbusinesslike thing, and it seems to me that that is a badge of folly at once. Then the cases are clear, that the Court will not be bound by the consent of all the creditors. The Court will, although the consent of all the creditors has been obtained, consider whether what they have consented to is for the benefit of all of them taking them as a whole. I think the Court has gone further and I think rightly gone further, and said that under this Bankruptcy Act, the Court will not only consider whether what is proposed is in favour of the creditors of the bankrupt, but they will also consider whether what is proposed is safe or is detrimental to morality and to the public at large, and they will consider what is the position of the bankrupt with regard to creditors and see whether there are not future creditors who must come into existence immediately and whether what is proposed will not put them into imminent danger. I think that the Court has said so before and I think that the Court must say so now.

Then I am not satisfied that what was done here was for the benefit of the existing creditors. Neither am I satisfied, but on the contrary I am wholly dissatisfied with the idea that this could be anything but an imminent and immediate danger to future creditors who must come into existence immediately after this Order should be annulled. Therefore I not only am not prepared to disagree with the discretion of the Court but I think that the discretion of the Court was exercised rightly and that all the

reasons given by Mr. Justice CAVE are good reasons and reasons with which I should absolutely agree.

Under these circumstances I think that the appeal must be dismissed.

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BOWEN, L.J.:

I am entirely of the same opinion. With regard to the case of *In re Carr* (35 W. R. 150), it is sufficient to say in the first place that it does not raise the point that is raised before us, but a different point. I wish to add that I see nothing in *Carr's* case, or in the language used by the Court in *Carr's* case, read by the light of the subsequent matter, in the least inconsistent with what has been said by my brother the Master of the Rolls. The point which was raised in *Carr's* case is not the point raised to-day. There is a case which it seems to me raises precisely the same point and which was decided by the Court of Appeal—the case of *In re Dixon & Cardus* (see *ante*, Vol. V., p. 291). I think this case comes exactly within *In re Dixon & Cardus*. It would be impossible if anyone doubted any part of the decision in *In re Dixon & Cardus*, not to be bound by it. One has no power to differ from this Court of Appeal which has decided the point already. But it seems to me that the decision and the language in *In re Dixon & Cardus* are absolutely right, if I might venture to say so lest there should be any misconception, as to my hesitation or doubt. What is it that *In re Dixon & Cardus* (see *ante*, Vol. V., p. 291) seems to decide? It seems to me to decide in the first place that where there has not been a payment in full, and where there are no other objections to the receiving order, it is not enough for the debtor to collect the assents of his creditors and to come to the Court and say, "There, rescind the receiving order;" he ought if he wishes to move the Court to interfere in a matter which, to a certain extent, as in this matter, is one of discretion, to bring before the Court some clear ground for thinking that what is proposed is a *bona fide* proposal which it will be in the interests of the creditors to uphold. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said, that the proposal ought to be also one which is not detrimental to the public. I believe that is part and parcel of

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what the Court has to consider in these applications under the Act. A proposal of that kind must take the shape, as it is a business matter, of some scheme or plan. In the case of *In re Dixon & Cardus* the Court stopped short of saying that it was necessary as a matter of law that the plan or scheme which was proposed should be accompanied with, or based upon all the formalities of section 18, whether it ought to be so or not they left an undecided question. It was not necessary to decide it nor is it necessary to decide it here. I express no opinion upon it. But the Court said, even if it was not so, the existence of section 18 was a matter which the Court could not set aside. There was a section of the Act of Parliament which provided the machinery for dealing with arrangements between debtors and creditors and if the debtor had abstained from taking the benefit of the machinery provided by that section the Court would watch narrowly to see what he was doing and whether there was any just reason for his abstaining from taking the benefit of such machinery. Unless they were satisfied that the plan which he was bringing forward was one which, even if not exactly based upon the formalities of section 18, was still in substance one that was certain to result in success they would not certainly interfere with the discretion of the Court below which refused to receive such a scheme. That is really what *In re Dixon & Cardus* (*see ante*, Vol. V., p. 291) decides. To apply it to this case seems to me to apply it to a case which the facts demand imperatively in the interests of the creditors and the public that it should be applied.

I have nothing further to say except that this appeal seems to me to be really almost a hopeless one in spite of the ingenuity of Mr. Winslow.

FRY, L.J.:

I am entirely of the same opinion. It appears to me that this appeal was presented under the idle notion that the Court is bound by the assents of the creditors obtained not by a meeting of the creditors, not after a full and open discussion of the rights and interests of the parties and the position of things, but assents obtained by a man going round to his various creditors and

obtaining receipts or assents to the setting aside of this order—upon what representation and in what manner we do not know. It is an idle notion that the Court is bound by the assents of the creditors. The Court has far larger and more important duties to consider than merely whether the creditors have assented to the rescinding of the order. We are bound in the exercise of our jurisdiction in the matter, and I think I might almost say in all matters under the Act, to take a wider view. We are bound to regard not only the interests of the creditors themselves, who are sometimes, we may believe, careless of their best interests, but we have a duty with regard to the commercial morality of the country.

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Now I conceive that one of the objects of the statute was if not to put an end to, yet at least to discourage private arrangements between the debtor and his creditors and anybody who knows the history of the law between debtor and creditor of this country knows that private arrangements between debtor and creditor have been often scandalous and knows that they give opportunities for misrepresentation, for private bargains and for undue preferences, and I for one should pause long and much before I allowed the evils of private meetings between the debtor and his creditors to creep into the administration of this Act. In my judgment in the case of *In re Dixon & Cardus* (see *ante*, Vol. V., p. 291) I agreed with the Master of the Rolls that we would not lay down, that no proposition or arrangement could have effect given to it unless it proceeded under section 18 of the Act. I will not now say that no arrangement or proposition can have effect given to it except under those provisions but I repeat what I then said that I should hesitate long before I gave effect to them, and that for the two obvious reasons, on the one hand that the Legislature has provided a general scheme for proceeding in bankruptcy, has indicated the securities which are required and the discretions which are to be exercised before any composition or arrangement is to be binding ; and on the other hand the notorious evils which attach to private arrangements between debtor and creditors and which I for one should do my best to prevent creeping into the administration of this Act.

I think, therefore, that the decision of the Court below was

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perfectly right and was put on the right grounds, and that this appeal must fail.

Muir Mackenzie:

Will your Lordships allow the costs of the Official Receiver out of the deposit in Court?

THE MASTER OF THE ROLLS: Yes.

Appeal dismissed.

Solicitors: *J. Nicholls & Co.*, agents for *Nicholls & Brown*, Luton, for the debtor.

The Solicitor to the Board of Trade, for the Board of Trade.

Cases relied upon or referred to:

Ex parte Carr, In re Carr, 35 W. R. 150.

In re Dixon & Cardus, Ex parte Dixon & Cardus, see *ante*, Vol. V., p. 291; 37 W. R. 161.

PRACTICE.

IN RE HARVEY, EX PARTE PIXLEY.

BEFORE
MR. JUSTICE
CAVE.
1889.

Bankruptcy Act, 1883, section 7 and section 54.

Will—Gift of Annuity—Proviso against Alienation—Bankruptcy on Creditor's Petition—Right of Trustee in Bankruptcy to benefits under Will. April 2nd.

A testator by his will directed his trustees to pay out of the trust funds a sum of £250 a year to his son during the life of the testator's wife, and after her decease to divide the said trust funds into four equal parts and to pay the income of one such fourth part to his said son during his life and after his decease in trust for his children as therein mentioned.

The will also contained the following proviso :—"Provided also and I hereby declare that my said son G. C. Harvey shall not have power to alienate, charge, encumber or dispose of the said sum of £250 bequeathed to him during the life of my said wife, or the income whether original or accruing to which he will be entitled after her decease : and in the event of his alienating, charging, encumbering or disposing of the same or any part thereof, my said trustees or trustee shall cease to pay him either the said sum of £250 per annum or the income of the share whether original or accruing as aforesaid, and such last-mentioned income shall accumulate during the life of the said G. C. Harvey, and the accumulations thereof shall be held by my said trustee or trustees in trust for the person or persons who shall be entitled to the share of the said G. C. Harvey at his decease."

After the death of the testator the son was adjudicated a bankrupt on a creditor's petition, and the trustee in the bankruptcy claimed the benefits given to the bankrupt under his father's will.

Held: That the bankruptcy did not operate as a forfeiture ; and that the annuities remained payable and must be handed over to the trustee.

THIS was a case submitted to the Court for judgment as between Mr. Pixley the trustee appointed under the bankruptcy of *George Crawford Harvey*, and the trustees acting under the will of the late father of the said bankrupt ; and it raised the question whether the trustee in the bankruptcy was entitled to an annuity and other benefits given to the bankrupt under the will of his father, or whether the trustees under such will were entitled to receive the benefits given to the bankrupt under it and appropriate the same for the benefit of the children of the bankrupt.

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George Mills Harvey late of the Pines, Streatham Hill, by his will dated April 5th, 1881, after directing the conversion of his estate directed that the trustees should stand possessed of his residuary trust moneys, and the stocks, funds, shares and securities in or upon which the same should for the time being be invested thereafter called the said residuary trust funds upon the trusts following that was to say,—In trust to receive the annual income thereof during the life of his said wife and thereout to pay the several annuities following, that was to say to his said wife *Georgina Harvey* the sum of 1,000*l.* per annum during her life; to each of his children, *Catherine Emily Harvey*, *Florence Ann Harvey*, and *George Crawford Harvey* the sum of 250*l.* per annum during the life of his wife: to *Hubert George Oke*, the son of his step-daughter *Georgina Oke*, the sum of 200*l.* per annum during the life of his said wife; and to *Emily Moore* the sister of his said wife the sum of 100*l.* per annum during the life of his said wife, and to accumulate the residue of the income of the said residuary trust funds during the life of his said wife by investing the same and the resulting income thereof in the names or name of his said trustees or trustee in or upon any such stocks funds shares or securities as aforesaid so as to accumulate at compound interest with power from time to time to vary such investments into or for others of the same or a like nature such accumulations to fall into and form part of the said residuary trust funds. And the said testator declared that if from any cause whatever the income arising from the said residuary trust funds should not be sufficient to pay the whole of the annual sums directed to be paid thereout then the amount of the deficiency should be deducted in equal proportions from the annual sums directed to be paid to his children *Catherine Emily Harvey*, *Florence Ann Harvey*, and *G. C. Harvey* and the said *Hubert George Oke* it being his desire that the annual sums directed to be paid to his said wife and the said *Emily Moore* should under any circumstances be paid to them in full. And after the decease of his said wife the said testator directed his said trustees to set aside appropriate and invest in their names in any of the stocks mentioned in the will such a sum as would be sufficient to produce an annuity of 100*l.* a year which he directed should be paid to *Emily Moore* during her life and

after the decease of the said *Emily Moore* the funds on which such annuity was secured should fall into and form part of the said residuary trust funds, and after appropriating a sufficient sum to answer the said annuity of 100*l.* the said trustees were after the decease of his said wife to stand possessed of the said residuary trust funds. In trust to divide the same into four equal parts or shares and to stand possessed of one equal fourth part. In trust to pay the income thereof to his daughter *C. E. Harvey* during her life for her separate use (her receipt to be sufficient discharge) and after her decease. Upon trust for all the children of the said *C. E. Harvey* as therein mentioned. As to one other fourth part thereof. In trust to pay the income thereof to his daughter *Florence A. Harvey* during her life for her separate use and after her decease. In trust for all her children as therein mentioned. And as to one other fourth part thereof to pay the income to his son *George C. Harvey* during his life and after his decease. In trust for his children as therein mentioned. And as to the remaining fourth part thereof. In trust to pay the income to *Georgina Oke* during her life for her separate use and after her death to her children as therein mentioned. And the testator thereby declared that if any of his said children *C. E. Harvey*, *F. A. Harvey*, and *G. C. Harvey* and the said *G. Oke* should die without issue or without leaving any issue who should acquire a vested interest then in such case the said residuary trust funds as well original as accruing of any of his said children and the said *G. Oke* so dying as aforesaid should accrue to the other or others of his said children and the said *G. Oke* and if more than one in equal shares subject nevertheless as to such accruing share or shares to the same trusts and provisions as were thereinbefore declared and contained concerning the original shares thereby given in trust for his said children and the said *Georgina Oke*, and then followed this proviso : " Provided also and I hereby declare that my said son *G. C. Harvey* shall not have power to alienate charge encumber or dispose of the said sum of 250*l.* bequeathed to him during the life of my said wife or the income whether original or accruing to which he will be entitled after her decease. And in the event of his alienating charging encumbering or disposing of the same or any part thereof my said trustees or trustee shall cease to pay him either the said

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sum of 250*l.* per annum or the income of the share whether original or accruing as aforesaid and such last-mentioned income shall accumulate during the life of the said G. C. Harvey, and the accumulations thereof shall be held by my said trustees or trustee in trust for the person or persons who shall be entitled to the share of the said G. C. Harvey at his decease."

The said testator appointed his wife *Georgina Harvey*, his son *George Crawford Harvey* and *Henry Josiah Day* trustees and executors of his will. The testator died and his will was duly proved. Mr. *Day* afterwards retired from the trust and under the powers contained in the will a Mr. *Henry Russell* was appointed a trustee. *G. C. Harvey* afterwards retired from the trust and Miss *C. E. Harvey* was appointed a trustee in his place so that the trustees are now, the widow, Miss *Harvey*, and Mr. *Russell*.

George Crawford Harvey some short time since had a Receiving Order made against him upon which he was adjudicated bankrupt. He had not executed any charge on his reversion. The trustee under the bankruptcy was advised that a bankruptcy at the instance of creditors and not produced by the direct action of the debtor himself would not be within the restraining words of the will and that a trustee under a hostile bankruptcy would be entitled to the annuities given to the bankrupt. The trustees under the will however were not disposed to pay over the income to the trustee in the bankruptcy without an order of the Court.

Mrs. *Harvey* the annuitant of 1,000*l.* is still alive. Miss *C. E. Harvey* is still single. Miss *F. A. Harvey* is married but at the present time has no children. Mrs. *Oke* has only one son and the probability is that he may not live to acquire any interest. Mr. *G. C. Harvey* has several children. The trust fund produces an income in excess of the amount of the annuities.

The question therefore on which the judgment of the Court was prayed was whether the trustee under the bankruptcy of *G. C. Harvey* was entitled to the annuity and other benefits given to the bankrupt under the will of his late father or whether the trustees under the will of the testator were entitled to receive the benefits given to the bankrupt under his will and appropriate the same for the benefit of the children of the bankrupt.

E. Cooper Willis, Q.C. : for the trustee in bankruptcy.

By the will there is an absolute gift of 250*l.* a year to the son and then at the death of the testator's wife he is to have one-fourth of the residuary estate. Then follows the proviso that he shall not "alienate, charge, encumber or dispose of" his annuities, and the question is whether that clause bars the interest of the trustee in his bankruptcy. I can state the question very simply by adopting as my own the arguments used by Mr. Sugden, afterwards Lord St. Leonards, in the case of *Lear v. Leggett* (2 Sim. 479), where he says "The question in cases of this nature is, whether the act upon which the devolution of interest is to take place is to be done by the party, or whether he is to be passive or may be passive. *The King v. Robinson*, Wightwick's Rep. 386. That was a case in which an annuity provided for the personal support of the testator's son, was given over on his doing any act to charge or alienate it, and the Chief Baron held that a positive act must be done by the annuitant, and that a seizure of the annuity under his outlawry, did not fall within the words of the will so as to create a forfeiture. . . . Now bankruptcy is an alienation not by the voluntary act of the legatee, but by operation of law. It has been determined that there is a distinction between insolvency and bankruptcy, because, in the former case, the party makes the assignment, and it is by his own voluntary act that he has the benefit of the Insolvent Act. But the becoming bankrupt is compulsory. It is clear law that no forfeiture can take place except by an act which is strictly within the clause creating the forfeiture." In that case of *Lear v. Leggett* (2 Sim. 479) "Testator declared trusts of Stock for A. for life, and after his decease, for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate or attempt to alienate, it should operate as a forfeiture of the provision and the same should devolve on the person next entitled. A. who had several children became bankrupt. It was held that his assignees were entitled to his life interest." The case which will be relied upon against me is that of *Cooper v. Wyatt* (5 Mad. 482). There there was a "Bequest to trustees in trust to pay C. H. an annuity during his life, provided that if C. H. should by any ways or means whatsoever sell, dispose of or encumber the right &c. he

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might have for life then his interest to cease, and the trustees to apply the same for the benefit of his children. It was held on the bankruptcy of C. H., his interest ceased, and his children became entitled." But that case was before *Lear v. Leggett* (2 Sim. 479) and was considered in it. (Counsel also referred to *Wilkinson v. Wilkinson*, 3 Swan, 515.)

Herbert Reed: for the trustees of the will.

The trustees under the will simply desire to submit to the Court as to whom the annuities should go. The only effect to them will be a change of *cestuis que trust*. They desire an order of the Court, however, for their own protection because the case of *Cooper v. Wyatt* (5 Mad. 482) shows the course is not always clear. The trustees submit whether on the face of the will it is not apparent that the whole intention of the testator was to give a personal interest to the life tenant and a personal interest only so that if alienation were made it should come within the clause. The words used in *Cooper v. Wyatt* (5 Mad. 482) were very similar to the words here, but if your Lordship thinks *Lear v. Leggett* (2 Sim. 479) decides the matter the order of course will go.

CAVE, J.:

Judgment.

This case depends on some rather nice distinctions in previous cases as to the language of testators in making gifts and at the same time taking them away again when there is an alienation of the property either voluntary or in the case of bankruptcy. The case on the one side resembles *Lear v. Leggett* (2 Sim. 479) and on the other *Cooper v. Wyatt* (5 Mad. 482). Fortunately for me the case of *Cooper v. Wyatt* was dealt with in *Lear v. Leggett* which is a decision binding on me and the grounds of the decision in *Cooper v. Wyatt* were said to be not merely the subsequent clause forbidding alienation but that proviso joined with the mode in which the benefit was given and the Vice-Chancellor said that putting the two things together there was a clear inference to be drawn that the intention of the testator was that if in any case the property became alienated, in that case it was to go over. Now in all these cases the intention of the testator must be looked at, and

the case of *Lear v. Leggett* (2 Sim. 479) is a decision to the effect that where there is only a proviso that the annuity shall determine on the doing of something by the recipient, then, unless you can draw a contrary inference from the other parts of the instrument, the true construction is that there must be some active dealing by the person interested, and the becoming bankrupt is not such an active alienation as is contemplated by the testator. I think this present case comes within *Lear v. Leggett* (2 Sim. 479) and not within the more restrictive principle laid down in *Cooper v. Wyatt* (5 Mad. 482). The conclusion I come to is, therefore, that there has been no forfeiture of the income—that there has been no "alienating, charging, encumbering or disposing of" by the son, and that it is only in the case of one of those things that the trustees are to cease to pay the annuity. The annuity remains payable and must be handed over to the trustee in bankruptcy instead of to the son. I must answer the question in favour of the trustee in the bankruptcy of the son. The costs may come out of the trust fund.

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Order accordingly.

Solicitors : *Russell, Son & Scott*, for the trustee in bankruptcy.

A. Cumming, for the trustees under the will.



BEFORE
MR. JUSTICE
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PRACTICE.

IN RE APELT, EX PARTE BYRNE.

Bankruptcy Rules, 1886, Rule 112.

April 2nd. Costs of Solicitor—Order to Repay—Failure to Comply with Terms of Order—Motion to Commit—Debtors Act, 1869 (32 & 33 Vict. c. 62), section 4.

Where a solicitor was ordered under Rule 112 of the Bankruptcy Rules, 1886, to repay to the trustee by reason of the gross proceeds of the assets not exceeding £300, a certain sum paid to him as costs on the higher scale together with the costs of the order, and the solicitor repaid the amount so received by him in excess but failed to pay the costs, and application was made for his committal, the Court in the absence of authority refused to make an order to commit, being doubtful whether the respondent had been ordered to pay the money in respect of which a committal order was asked for in his character of solicitor.

THIS was an application by the trustee for the committal of the solicitor who had acted on behalf of the petitioning creditor in the bankruptcy in consequence of his neglect to pay to the trustee certain moneys in accordance with an order of the Court.

By Rule 112 of the Bankruptcy Rules, 1886, it is provided “(2) Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of three hundred pounds, a lower scale of solicitor’s costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added; and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed three hundred pounds, the excess shall be disallowed, and if paid, shall be repaid to the trustee.”

In the present case certain costs were paid to the solicitor on the higher scale, but the gross proceeds of the assets were afterwards found to be under 300*l.*, and an order was made directing the solicitor to repay to the trustee the sum of 8*l.* 12*s.* 7*d.* with costs.

The solicitor paid the 3*l.* 12*s.* 7*d.*, but omitted to pay the costs, and application was now made for his committal.

Duke : for the trustee.

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BYRNE.

I submit that the order now asked for is within the principle laid down in the case of *In re Hope* (L. R. 7 Ch. App. 598; 26 L. T. 814; 20 W. R. 694), where Lord Justice MELLISH said: "I do not say that if a solicitor in his character of a solicitor were ordered to pay a sum of money with costs he would not be liable to be imprisoned for non-payment of the costs as well as of the original sum recovered." And Lord Justice JAMES said: "I agree that in the case supposed of a solicitor being ordered in his character of solicitor to pay a sum of money with costs, the costs would be considered as included in the sum ordered to be paid." Repeated applications have been made to the solicitor of which he takes no notice. There are no goods on which to issue execution and I ask for an order now, to lie in the office for a time if your lordship so pleases.

[CAVE, J.: I do not feel at all sure that this case is within the enactment. This man is a solicitor ordered to pay the money but I am no means clear that he is ordered to pay it in his character of solicitor.]

A solicitor receives the money in a case like this with notice that until the estate is wound up he may have to repay it.

CAVE, J.:

It can scarcely be that a solicitor who receives costs in a bankruptcy is obliged to keep the money in his pocket on the chance of that. I am not at all satisfied on the point. You may mention it to me again if you can find authority. I shall certainly not make any order now, and all I can do is to direct the case to stand over generally.

Solicitor : *C. Curtis* : for the trustee.

The solicitor was not represented.

PRACTICE.

**BEFORE
MR. JUSTICE** IN RE CALDERWOOD, EX PARTE THE BOARD OF TRADE.

CAVE.

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Bankruptcy Act, 1883, sections 162 and 102, sub-section (5).

April 3rd. Order by Board of Trade on Trustee to Furnish Account—No Evidence of Moneys Remaining in Hands of Trustee—Right of Board of Trade to demand Account.

The fact that there is no evidence of any moneys remaining in the hands of a trustee who is ordered by the Board of Trade to furnish an account under section 162 of the Bankruptcy Act, 1883, will not justify such trustee in refusing to comply with the requirements of the order so made.

Thus where a scheme of arrangement under a liquidation petition was accepted by the creditors by which 20s. in the pound was paid, and the debtor obtained his discharge, but the trustee after his release was required by the Board of Trade to furnish a proper account.

Held : That the Board of Trade were entitled to demand that an account should be rendered ; and that the trustee must comply with the order.

THIS was an application by the Board of Trade under section 102, sub-section (5) of the Bankruptcy Act, 1883, for an order of the Court to enforce compliance with an order of the Board of Trade upon one *Soppett* the trustee in the liquidation of *Calderwood*, directing him to furnish an account of the moneys received by him as such trustee.

In the year 1882 the debtor *Calderwood* filed a liquidation petition under the Bankruptcy Act, 1869, and *Soppett* was appointed receiver. The assets were 1,192*l.* stock-in-trade and 270*l.* book debts.

On November 21st, 1882, liquidation by arrangement was agreed upon and Mr. *Soppett* was appointed trustee.

No further steps were taken until March 18th, 1887, when a meeting of creditors was held and a scheme of arrangement accepted by which 20*s.* in the pound was to be paid.

On April 29th, 1887, the trustee certified to the Court that he had sufficient money in his hands to pay 20*s.* in the pound, and the

scheme was thereupon sanctioned and the debtor obtained his discharge.

On January 10th, 1889, the Board of Trade under section 162 of the Bankruptcy Act, 1883, directed the trustee to furnish accounts of moneys under the liquidation, but that order not having been complied with application was now made to enforce it.

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Muir Mackenzie : for the Board of Trade.

I ask your lordship to make an order directing Mr. *Soppett* immediately to furnish the necessary account.

Herbert Reed : for the trustee.

What the Board of Trade asks for imposes a troublesome duty on the trustee because he has at his own expense to make out all moneys paid and received since 1882. He cannot be paid for doing this in any way, and although Mr. *Soppett* can do it, he does not wish to be put to the trouble of doing so unless he is obliged. This is not a case where a person having money to pay into the Bankruptcy Estates Account fails to do so. There is no evidence here that there is any money in the hands of the trustee at all. This is a high-handed proceeding where there is no evidence of any account being necessary at all. Under section 91 of the Bankruptcy Act, 1883, the Board of Trade can make inquiry and that is the proper course for them to take.

[CAVE, J. : The trustee is bound to keep an account, and if he has done so what is asked of him is very simple. If he has not kept an account it is quite right that he should now make one.]

The trustee will have to vouch every penny paid away and it is a matter of considerable trouble. Can a trustee who is not shown to have money in his hands be within section 162 ? By that section the Board of Trade may at any time order a trustee to submit to them an account verified by affidavit of the sums received and paid by him. But does the section apply to any person who may have ever acted under any statute ?

[CAVE, J. : Most of the receipts here have been since 1883, and since the trustee knew what his liabilities were.]

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~~CALDERWOOD~~, trouble and I put the point, Is the Board of Trade empowered to order this where there is no evidence of any moneys being in the hands of the trustee? The trustee here has been released.
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[CAVE, J.: Has there been any audit of his accounts by anybody?]

I cannot say. The usual course in a liquidation was to have an audit by the committee.

CAVE, J.:

Judgment. I think Mr. Soppett must give an account here. There is no reason why he should not do so. He may have what time he wants of course. Probably twenty-one days will be sufficient.

Muir Mackenzie :

I ask your Lordship for costs.

Herbert Reed :

And I ask that the costs may be reserved in order to see if there was any need of an account and if any good comes of it.

CAVE, J.:

I think so. I will reserve costs with liberty to apply.

Order accordingly.

Solicitors: *The Solicitor to the Board of Trade*, for the Board of Trade.

R. H. Gill, for the trustee.



PRACTICE.

IN RE TATUM, EX PARTE THE BOARD OF TRADE.

BEFORE
MR. JUSTICE
CAVE.
1889.

Bankruptcy Act, 1883, section 102, sub-section (5), and section 74, sub-section (6).

Application to commit—Defaulting Trustee—Neglect to comply with Order of Board of Trade to pay Moneys into Bankruptcy Estates Account—Principal and Interest.

April 3rd.

Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys together with a further sum as interest at the rate of 20 per cent. charged under section 74, sub-section (6) of the Bankruptcy Act, 1883, and the Board of Trade applied for an order of committal.

Held: That an immediate order of committal must be made in respect of the principal sum; but that such order would not issue for a week and not go out at all if within that time the trustee should pay into the Bankruptcy Estates Account the amount due, together with the costs of the motion.

That an order would be made directing the trustee to comply with the order of the Board of Trade requiring him to pay the sum charged as interest within a fortnight.

Where a trustee who retains moneys belonging to the estate has been removed from office interest may be charged during the time he so retains the moneys in his hands and not only up to the time of his removal.

THIS was an application by the Board of Trade for an order for the committal of one *Harker*, who had acted as trustee in the bankruptcy of *Tatum*, in consequence of his neglect to comply with an order of the Board of Trade to pay certain moneys into the Bankruptcy Estates Account.

On October 23rd, 1888, an account was rendered by *Harker* of his receipts and payments as trustee from August 20th, 1886, to October 23rd, 1888.

On December 22nd, 1888, the trustee was required by the Board of Trade to pay into the Bankruptcy Estates Account the sum of 278*l.* 1*s.* 8*d.* being the amount found due on the taking of the account after audit. Certain sums were disallowed from the account, the balance in the hands of the trustee being certified to

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be 217*l.* 9*s.* 6*d.*, to which was added the sum of 55*l.* 12*s.* 2*d.* interest at the rate of 20 per cent. per annum under section 74, sub-section (6), of the Bankruptcy Act, 1883, which provides that "If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default."

The trustee had failed to pay the said sum of 273*l.* 1*s.* 8*d.* and application was now made for his committal.

Muir Mackenzie : for the Board of Trade.

This case is a very similar one to that of *In re Nicholson, Ex parte the Board of Trade* (see *ante*, Vol. 5, p. 278) which was against the same trustee. There is this further point. The interest here is charged up to the time of the audit. The trustee was removed from his office some time before, and the interest is therefore charged during the time he has had the money in his hands and not only for the time he was really trustee. The difference here would only be a few pounds but I thought it right to mention the point that the interest has been calculated for the time the money has been in the hands of the trustee and not up to the time of his removal.

Pocock : for the trustee.

This case is different to that of *In re Nicholson, Ex parte the Board of Trade* (see *ante*, Vol. 5, p. 278). There it was an application for the principal and not for any interest. Even if an order of committal were made in the case of the principal no order ought to be made in respect of the interest. It cannot be said that the trustee has improperly retained the interest and it is not a proper course to apply at once for an order of committal with regard to it. The proper order to ask for would be one under section 102, sub-section (5) of the Bankruptcy Act, 1883, directing the trustee to

comply with the order of the Board of Trade. The trustee has sureties for the principal and the sureties would pay that at once if the Board of Trade asked them.

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[CAVE, J.: It has already been held that the Board of Trade are not compelled to go to the sureties. They look to the trustee.]

The principal will be forthcoming from the sureties, but they are not liable for the interest and I ask your Lordship not to make an order of committal as to that now.

Muir Mackenzie.

I am willing to accept an order for committal as to the principal and an order directing immediate payment of the interest if your Lordship so pleases.

CAVE, J.:

There will be an order for committal, but such order not to issue Judgment for a week and not to go out at all if within that time Mr. Harker pays the sum of 217*l.* 9*s.* 6*d.* into the Bankruptcy Estates Account and the costs of this motion.

There will be a further order to pay the balance of the amount certified, viz. 55*l.* 12*s.* 2*d.* in a fortnight.

Orders accordingly.

Solicitors: *The Solicitor to the Board of Trade*, for the Board of Trade.

N. Bennett, for Mr. Harker.



COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
FRY, L.J.
LOPES, L.J.
1889.

April 15th
and 16th.

IN RE BATTEEN, EX PARTE MILNE.

Deed of Arrangement—Registration—Material Alteration—Deeds of Arrangement Act (50 & 51 Vict. c. 57), sections 5, 6, 7, 12.

A deed of arrangement executed by a debtor on June 25th, 1888, purported to be made between the debtor himself, the trustee, a committee of inspection, and "the several persons, companies and firms whose names and seals are hereunto signed and affixed respectively, being creditors of the said (debtor) and all other creditors of the said (debtor) acceding hereto."

The deed recited that "whereas the said debtor is indebted or liable to the said creditors in or for the several sums set opposite their respective names in the schedule hereto, and being unable to meet such liabilities in full" he assigned all his property to the trustee upon trust to pay the costs and priority debts "and to divide the balance of such moneys rateably among the creditors parties hereto, including as such creditors if the trustee and inspectors shall determine but not otherwise such persons being creditors of the said debtor as may have refused or neglected to execute these presents."

On July 2nd, 1888, the deed was duly registered in accordance with the provisions of the Deeds of Arrangement Act, 1887, but in the copy of the schedule then filed the name of only one creditor appeared as having executed the deed, several other creditors executing subsequently.

A receiving order having been made against the debtor, the trustee under the deed appealed against such order on the ground that the petitioning creditor's debt did not amount to £50, but the objection was taken that the trustee had no *locus standi* to appeal against the receiving order, since the deed produced by him had not been registered in the form it then was and was therefore void.

Held: That the deed was properly registered and had not been altered ; and that the trustee was entitled to appeal.

THIS was an appeal from a decision of the Divisional Court in Bankruptcy by which it was held that *J. Milne*, the trustee under a deed of arrangement executed by the debtor *C. W. Batten* for the benefit of his creditors, had no *locus standi* to appeal against a receiving order which had been made against the said debtor in the Bristol County Court.

The case raised an important question under the Deeds of Arrangement Act, 1887.

On June 25th, 1888, the debtor *Batten* executed a deed which

purported to be made between *Charles William Batten* (the debtor), *James Milne* (the trustee), a committee of inspection, "the several persons, companies and firms whose names and seals are hereunto signed and affixed respectively being creditors of the said Charles William Batten: and all other creditors of the said Charles William Batten acceding hereto (herein called the creditors)," and *Maria Waite* the mother of the debtor who postponed a claim which she had on the estate in favour of creditors generally. And it recited that "Whereas the said debtor is indebted or liable to the said creditors in or for the several sums set opposite their respective names in the schedule hereto and being unable to meet such liabilities in full it has been agreed that the several parties hereto shall enter into the respective covenants and agreements hereinafter contained." The indenture witnessed that in pursuance of the said agreements and in consideration of the premises the said debtor assigned all his property to *Milne* upon trust to pay the costs and priority debts as in cases of bankruptcy. "And to divide the balance of such monies rateably among the creditors parties hereto (including as such creditors if the trustee and inspectors shall determine but not otherwise such persons being creditors of the said debtor as may have refused or neglected to execute these presents)." The deed further provided that the debtor should remain in the trustee's employ as a manager at a weekly salary and should exercise his best skill and ability to wind up the business: and the creditors (provided the deed was duly registered and was not set aside in bankruptcy) released the debtor from the debts specified in the schedule and from all other debts (if any) in respect of which the said creditors would be entitled to receive dividends under the deed. There were also the usual provisions as to the remuneration of the trustee, &c.

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IN RE
BATTEN,
EX PARTE
MILNE.

This deed was executed on June 25th, 1888, by the debtor, by the trustee, by the mother of the debtor, and by one creditor, who was also a member of the committee of inspection, named *Nelson Fedden* whose name appeared in the schedule with a debt of 81*l.* 3*s.* 6*d.*

On July 2nd, 1888, the deed was duly registered in accordance with the provisions of the Deeds of Arrangement Act, 1887.

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Subsequently to the registration, however, several other creditors executed the deed.

On September 24th, 1888, a bankruptcy petition was presented against the debtor in the Bristol County Court founded on the deed as an act of bankruptcy and a receiving order was made against him on October 18th, 1888.

The trustee under the deed of arrangement appealed against the receiving order on the ground that there was no good petitioning creditor's debt.

It was admitted in the Divisional Court that the petitioning creditor's debt did not amount to 50*l.*: but it was contended that the trustee had no right to appeal since the deed had not been duly registered in the form in which it was produced and was therefore void.

The Divisional Court held that the trustee had no *locus standi* to object to the receiving order and from that decision he now appealed.

Rigby, Q.C. (Yate Lee and F. C. Willis with him): for Mr. Milne.

The Divisional Court was of opinion that the deed which was produced by the trustee had not been registered in compliance with the Deeds of Arrangement Act. It was admitted that the petitioning creditor had not a sufficient debt on which to present a petition. If I can establish a *locus standi* therefore the receiving order must go. The other names except the first—that of Mr. Nelson Fedden—appearing in the schedule to the deed have been added since the registration on July 2nd, 1888, and it was on account of those names being added that the deed has been held void. But the true copy of the deed was registered as it then existed and at that time the provisions of the Act were complied with. Nothing can alter the fact that the deed which was executed and which passed the property was registered. At the time of registration all the requirements of registration were complied with and there was no avoidance by the Act. Further I also say that there was no alteration in the deed. By a long series of decisions this particular class of deeds have received an operation different from the strict original meaning of them. The Courts of Equity have laid

down that a deed which is in terms for scheduled creditors is not confined to scheduled creditors. In deeds of arrangement the Court assumes that all creditors shall be entitled to take the advantage, and it will construe deeds to that effect even though there may be some difficulty of language. The substance of the decisions is that no creditor shall be excluded except by his own fault. (Counsel referred to the Deeds of Arrangement Act, 1887, sections 4, 5, 6, 7, 9, 11, and 12. *Boldero v. London and Westminster Loan & Discount Co. Limited*, L. R. 5 Ex. Div. 47 : 42 L. T. 57 : 28 W. R. 154; *Jolly v. Wallis*, 3 Esp. 229; *Hearn v. Baker*, 2 K. & J. 383; *Whitmore v. Turquand*, 1 J. & H. 444; *West v. Steward*, 14 M. & W. 47.)

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Sir R. Webster, Q.C., Attorney-General (Muir Mackenzie and Herbert Reed with him) : for the official receiver.

This case has been argued without considering the object with which the Deeds of Arrangement Act was passed. The intention was that the whole transaction should be registered. It is only from the deed that an examining creditor can find out what other creditors have consented. Unless the actual transaction is registered it is impossible to find out the facts by examination. The most important thing for the examining creditor to see is what other creditors have assented to the deed. It was intended that the deed of arrangement should be registered and not that part of it which could be got together in seven days. The whole deed is to be registered not a part of it. Where the rights of creditors are to be affected by the execution or non-execution of the deed, then those who do execute it must do so before registration.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this case a receiving order has been made under the Bankruptcy Act, whereby the trustee of an assignment which is a deed of arrangement has desired to come in as a person aggrieved under a section of the Bankruptcy Act to dispute the validity of the Receiving Order. His ground is that he being the trustee of a deed of assignment for creditors, would be aggrieved if this bankruptcy were to stand, because he says "If this bankruptcy remains, it is a bankruptcy within three months of the time when the deed

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of arrangement was executed and that being the arrangement it is an act of bankruptcy, and if it is an act of bankruptcy, then I and those whose trustee I am will be aggrieved because we shall only come in as creditors with others. If the bankruptcy stands that will be the result, but I say that the bankruptcy ought not to stand, because the petitioning creditor in that bankruptcy is not a creditor to the extent of 50l." The answer to that is this "That might be true if you could present yourself here as a trustee of a deed of arrangement, but you cannot because your deed of arrangement has not been registered and as it has not been registered it is void altogether."

Now the matter which will decide and determine the question seems to be whether this deed of arrangement is properly registered. If it is not properly registered it is enough to say that I shall assume it would be void against all the world and this trustee could not come in. If it is properly registered then I am bound to say that he can, and the question therefore is whether it is or is not properly registered. Whether it is or is not properly registered depends on what is the true construction of the deed itself and then what is the effect upon it of the Act which obliges it to be registered. You must see how that Act will apply to it when you have once construed that deed, but it seems to me we must first construe the deed just as if there were no such Statute in existence.

Now it is said that the deed which the trustee relies upon when he comes to dispute the bankruptcy never has been registered at all. It is said that there was a deed registered. That cannot be denied, but it is said that it is not this deed, because the deed which was registered has been altered and that the deed which was registered has become void because it has been altered, and there is no deed registered at all.

Now, whether the deed has been altered or not must depend greatly on the construction of the deed. If all that has been done has been within the terms of the deed to carry out the deed, I cannot see how it can be properly held that the deed has been altered. To carry out a deed is not to alter it. You alter the deed if you alter the effect of the deed in any part of it; but if all

you do is to carry out the deed I cannot myself see how you can be said to have altered it.

Now, what has been done and what is the deed? The deed first of all, determines who are to be parties to the deed. There are certain persons who are named as parties, and then you come to what creditors are to be parties to the deed. The first creditors who are to be parties to the deed are "The several persons, companies, and firms whose names and seals are hereunto signed and affixed." Those no doubt will be in the schedule, because that is the mode in which creditors do sign and affix their names and seals. They are to be parties to the deed by signing and sealing in the schedule. But then there is another set of people who are to become parties namely, "All other creditors of the said Charles William Batten acceding hereto." Besides those who come in and seal and sign in the schedule this says there are others who do not sign and seal, but who accede or assent thereto, that is to the deed. Accede there means assent to. They assent and become parties to the deed although they do not sign and seal. If they do assent to be parties to the deed they are parties to the deed by the terms of the very deed itself. They are parties to the deed just as much as those who have signed and sealed. Then it goes on in rather an odd way, but still plain enough, to say this:—The trustee is appointed upon trust, after paying many things, to pay all claims which are by law entitled to priority and so on, and then in trust to divide the balance of such moneys rateably amongst the creditors parties hereto. Up to that point that clearly includes the creditors "parties hereto." Who have we got "parties hereto" up to this moment? Those who have signed and sealed and those who have assented without signing and sealing. Then you come, in a way which is sometimes done in these deeds and which makes difficulty always, to add under a sort of parenthesis some other creditors who are made parties to the deed besides those who are already enumerated, "including as such creditors if the trustee and inspectors shall determine but not otherwise, such persons being creditors as may have refused or neglected to execute these presents." There is no time and no date fixed when you can say that they have "neglected." Refused is plain enough. That would mean an

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express refusal. They may have refused once to assent and afterwards have been willing to assent but then if they have once refused according to this the trustee may consider whether he will allow them to retract their refusal and to come in and assent. If he does then you have got a third set of people who become parties to the deed. I have already mentioned those who have executed by signing and sealing and those who have assented without ever having refused, but now you have a third class, namely, those who have once refused but who are afterwards willing to come in and whom the trustee allows to come in. That is a third class. Then here is a fourth class. Those who have "neglected to execute." I say that the time at which it can be said they have neglected is not fixed but it is to be supposed there is some time or other at which they have neglected to sign, but then after having neglected they are willing to come in, and the trustee allows them to come in. He may reject them. If he rejects them after they have refused or rejects them after they have neglected, whenever that is, they cannot come in at all and they will not be parties to the deed; but if after having neglected they then are willing to come in and he lets them come in that is a fourth class of creditors who have now come in. Then what is the result? They are parties to the deed. Then you have as parties to the deed all those creditors. Then what is to happen? The residue is to be divided amongst the creditors "parties hereto." Then the moment they have done any one of these four things they are parties. Whenever they do these things what do they do? They carry out the deed. They are parties to it. Therefore when they come into any one of these four classes, however late, if it is before distribution they have come in as parties to the deed, and however late they may have done so, when they do so, they are carrying out the deed and not altering it. What they do is carrying out the deed. How can that which carries out the deed be said to alter it? It cannot. The suggestion is that at a moment this deed was complete and at some time afterwards it was altered. If what I have said is true, this deed never was complete, and never was altered. It never was complete until it had been fully carried out by all that has been done and therefore it has never been altered.

Now comes the question whether it has been rightly registered

and that is quite a different thing. If it has been rightly registered, although it was not complete in one sense, then it has not been altered; and it has always remained the same deed. It is not that there has been a deed which has been avoided by something which has altered it but it never has been altered. It is always the same deed, and everything that has been done under the deed has been the carrying out of the deed. Then comes the question "Has it been registered?" and upon that we must come to the Statute and see whether anything has been done in attempting to register the deed which ought not to have been done and which vitiates the registration or whether anything has been omitted to be done which has made the registration ineffective.

Now the effect of this Statute, as I have said, is this, that if a deed of arrangement is not registered it is altogether void against all the world. If a deed has been registered it does not prevent it from being an act of bankruptcy. Although it has been registered, it is an act of bankruptcy; and if therefore, it can be relied upon as an act of bankruptcy—that is if it is within the limit of time of the bankruptcy within which it can be relied upon, although it has been registered it is an act of bankruptcy. But if it is void altogether, that question does not arise.

Now it is said that this deed was void altogether for want of registration. The first section of the Act of 1887 with which we have to deal is section 5. A deed of arrangement "shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor." There is a time limited for its registration, namely, within seven days after the debtor has executed it or within seven days, not after the creditors have executed it, but after "any creditor" has executed it. If the debtor executes it first, according to that, it must be registered within seven days after he has executed it. If a creditor executes it first then within seven days after he has executed it although others have executed it later. The time of starting is the first execution of the deed by somebody either by the debtor or by one creditor. If you take section 5 alone that would seem to be clear. Let us see whether there is anything in the Statute which cuts that down. Section 6 says the registration "shall be effected in the following manner:—A true copy of the

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deed, and of every schedule or inventory"—now mind, it is not every schedule or inventory which may exist, or which may be used with regard to the deed: But here the words are distinct "every schedule or inventory thereto annexed"—that is the first, and if it is not annexed it is not within that part of it—"or therein referred to." Therefore you must have a reference to the particular schedule to bring it in and those are the schedules a copy of which is to be registered—a schedule annexed to the deed or a schedule referred to in it. If the deed is to be registered within seven days after its execution by somebody and there is a schedule annexed to it, one would think that a copy of that schedule must be given in at the time of the registration. How can you give a copy of the schedule at the time of the registration, unless you give a copy of the schedule as it is at that moment. Then if there is a schedule referred to, it is just the same thing. You are to give a copy of it. Then you must give a copy of it as it exists at that moment and then you will have complied with the Statute. The section goes on :—"Or therein referred to shall be presented to and filed with the registrar within seven clear days after the execution of the said deed." If there is a schedule annexed to it or there are schedules annexed or if there is a schedule referred to or there are schedules referred to, a copy of it is to be given in and filed. That must be in the state in which they are at that time. If there are any schedules which neither are annexed to nor referred to in the deed they need not be filed at all, and there is nothing to show they are to be filed within that clause.

Then you have this :—"together with an affidavit verifying the time of execution and containing a description of the residence and occupation of the debtor, and of the place, or places where his business is carried on." That is an affidavit not made by the debtor or by anybody named. It apparently may be made by anybody. That affidavit is to go in and there is nothing in that affidavit which does not exist at that moment. Then you have another affidavit :—"And an affidavit by the debtor stating"—what? Not stating the number of creditors who have assented or the number of creditors who have sealed, but "stating the total estimated amount of property and liabilities included under the deed, the total amount of composition payable thereunder and the

names and addresses of"—what? Not of the creditors who have become parties to the deed; not of the creditors who have signed and sealed: not of the creditors who have assented, but of "his creditors." That is to say he is to give a true affidavit of all his creditors. Is there anything in that which shows that everybody must have sealed at the time when the registration was to take place? It seems to me certainly not. There is nothing in section 12 when one comes to consider it which affects what is to be done at the moment of registration. It is only as to what a person may look at and what he may copy and take away, but that does not alter the registration.

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Upon the reading of the Statute it seems to me to be wrong to say, as the Attorney-General and Mr. Muir Mackenzie, have said, that the schedule which is to contain the names of those who sign and seal must be completed before there can be a registration. Nay so far from there being anything which says that that must be so, it would seem that would defeat the Act if that were necessary. If you cannot register until all who are to sign and seal have signed and sealed and are in the schedule, then in such a deed as the present it would be impossible to register it according to the Statute, because if that were true, it would almost inevitably be that the schedule would not have been filled up within the seven days, and if it had not been filled up within the seven days according to that argument there cannot be registration. It seems to me to construe the Statute in that way would be to defeat it. I do not agree with what Mr. Muir Mackenzie says that this Act is to be construed strictly, and that with regard to registration it is to be construed strictly. On the contrary I should think that the object of the Legislature was principally that the deed should be registered, and that all deeds of arrangement should be registered, and if so, instead of construing it strictly, one ought to construe it largely, so as to bring within its grasp, not only the few deeds of arrangement in which the schedule will be filled up within seven days of its commencement but all deeds of arrangement including those where the schedule is not filled up seven days after the arrangement. If that be so this deed was rightly registered according to the Act. All the conditions of registration and all the forms of registration which are required were all fulfilled. Then it

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is a deed rightly registered and which has not been altered so as to render it a void deed so as to defeat it by any alteration since the registration because all that has been done since the registration has not been either for the purpose of or with the effect of altering the deed, but only for the purpose and with the effect of carrying out the deed. Under those circumstances it seems to me that the deed upon which this trustee is relying is a registered deed. This as I have said before does not prevent it from being an act of bankruptcy. It was an act of bankruptcy but then it is met by the Bankruptcy Act, and not by this Act in this way. It is an act of bankruptcy if it is within the time. That would be fatal to it as to its effect in favour of these creditors but it leaves them as creditors and enables them to come in and say this receiving order ought not to have been made; it affects us if it is made, it makes that which we have done an act of bankruptcy which can be relied upon but it ought not to remain to molest us because the petitioning creditor's debt is not a sufficient debt upon which to found a receiving order. I think therefore that they have a *locus standi* and that their objection to the bankruptcy is fatal and therefore with great deference I must differ from the decision of the Divisional Court, and say that this appeal must be allowed.

FRY, L.J. :

The question in this case comes before us in rather a curious way. It is admitted that if the appellant Mr. Milne can open his mouth to the Court he will be able to defeat the petitioning creditor, because the petitioning creditor has it is admitted no sufficient debt to support the petition, and therefore the simple inquiry is this, Can Mr. Milne be heard at all upon the matter?

Now Mr. Milne claims under a deed executed on June 25th, 1888. He is the trustee and assignee of the whole of the debtor's property. On that June 25th, the deed in question was executed by the debtor Batten, by the trustee, Mr. Milne, by the mother of the debtor who was postponing a claim which she had on the estate in favour of creditors generally, and by another person who filled the double character of Inspector under the deed and a creditor

of Mr. Batten's. Now at common law the execution of that instrument undoubtedly passed the property, or whatever was comprised in it to Mr. Milne. What was previously vested in the debtor became vested in Mr. Milne, but under the Bankruptcy Act that instrument would be a void instrument by a bankruptcy within three months, and the estate would be divested from Mr. Milne. Therefore *prima facie* Mr. Milne is a person who will be aggrieved if his assignor is wrongly made bankrupt. He is therefore *prima facie* a person who is at liberty to open his mouth to show that his assignor cannot properly be made a bankrupt. That *prima facie* title of Mr. Milne to be heard is endeavoured to be met in this way. It is replied "No, your deed of June 25th is a void instrument; you are therefore not aggrieved by the bankruptcy." That is the question which we have to determine, namely, whether that allegation is true and can be supported or not.

Now I pass on to observe that after June 25th, viz., on July 2nd and therefore within seven clear days of the execution by the debtor, the deed was duly registered in pursuance of the Act of 1887 to which our attention has been so fully directed. Subsequently to that date certain creditors beside the one that executed on June 25th appended their names and seals in the schedule as creditors of the debtor. These are the short facts.

Now it is said in the first place that the deed was altered in a material particular by the signature of those creditors, and therefore it is said that the deed was void. But there are two answers both of which are in my judgment sufficient to meet the allegation. In the first place it is common knowledge that the subsequent cancelling of an instrument which has conveyed an estate, does not divest the estate which has been conveyed by it. It may affect and may destroy the evidence of the conveyance, but it does not divest the estate. Therefore speaking still as if this matter were at common law it is obvious that the execution by the creditors after June 25th and after July 2nd, cannot avoid the assignment of the property which had been effected on June 25th and which was in full force on July 2nd. Therefore the estate which had been vested in Mr. Milne remained vested in him even if the deed was subsequently cancelled and he has a *prima facie* right to appear in the matter to show that by the bankruptcy that estate has not been divested from

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him. That is the first answer and I think it is a good answer in law.

Then the next is this : that the execution by the creditors subsequently is not a material alteration of the deed in the sense in which those words are used when it is said that the material alteration of the deed would cancel it. And why? Because the subsequent execution was the fulfilling of the deed and not the cancelling of it. The deed itself carries on its face an intention that it shall be the subject of subsequent execution. The parties of the fourth part are "The several persons, companies, and firms whose names and seals are hereunto signed and affixed respectively being creditors of the said Charles William Batten and all other creditors of the said Charles William Batten acceding hereto." Now accession to a deed may be in various ways. One well-known and familiar way of acceding to a deed of this description is by executing the deed in the schedule, but further than that the accession by execution is a matter so entirely in the contemplation of the deed that the neglect or refusal to execute may give a right to the trustee to exclude a creditor from the benefit of it. So far then from the subsequent execution being a thing inconsistent with the deed it is a thing which the provisions of the deed are calculated to enable a trustee to compel. I cannot hold that that which the deed contemplates, and which the trustee under the deed may compel to be done, can cancel the deed itself.

But it is said that however this matter may rest at common law the whole matter is affected by the statute of 1887 and that the deed is made void by that. Before I refer to the provisions of that Act of Parliament I wish to pause for one moment to consider what was the law and the practice at the time when that statute was passed. It is old and very familiar law that the Courts have leaned, and leaned very strongly in favour of allowing creditors to come in under such deeds as these. They have done so because the exclusion of creditors from the benefit of deeds is an injury to those creditors. It has done so because the scheme of such a deed is to let in all creditors and therefore by a series of decisions both at common law and in the Courts of Equity the inclination of the Courts has been made manifest—I would almost say to compel the trustee to allow everybody to come in, to make the administration of these instru-

ments as equitable as possible ; to give all creditors a *pari passu* claim under them and accordingly it has been held over and over again that the filling up of the blanks in such instruments by the creditors coming in is not an alteration of the deed which could avoid it.

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Therefore we approach the Statute with the knowledge that the practice was to allow such creditors to come in and that the law favoured it and almost compelled it. Therefore we have to inquire whether the argument suggested on the Statute is a tenable one and whether the old practice and well known and familiar law that existed at the time of the Statute was intended to be entirely altered in the manner that has been argued because the argument before us has been this,—that the Statute requires that the whole transaction shall appear on the face of the deed ; that all the creditors shall be in the schedule ; that the whole thing shall be finally fixed and settled at the time the copy of the deed is made, so that persons who have inspection of that copy may know exactly the whole position of the debtor's estate. It follows from that of course that after the registration no creditor however just his claim may be, however accidental may have been his omission to come in, can ever come in and therefore that equality between the creditors which had been the anxious desire of the Court previously to promote is to be excluded by the operation of this Act. I can find nothing in the Act which leads to that conclusion, and I find a great deal which to my mind is absolutely inconsistent with it. In the first place, I find that the Act is addressed to all cases in which the instrument is in respect of the affairs of the debtor and is for the benefit of his creditors generally and I find that the words creditors generally are to include all creditors who may assent or take the benefit of the deed of arrangement. Therefore there is apparently an anxious desire that everybody who assents, everybody who is to take the benefit of it shall be included in the operation of these deeds, an indication that the old view of the law with regard to these deeds that they should include all, was in the mind of the Legislature. It is to be observed, it recognised that assent and taking the benefit does not require execution and does not require that they should be entered in any particular schedule. But again we have in section 5 of the Statute the time at which

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the registration is to be made, fixed, and that is within seven days of the first execution of the deed by the debtor or by any creditor. If the view contended for by the respondents were correct every creditor who could come in must come in within these seven days, and yet the Act is silent as regards anything of the sort. The time of registration is fixed with regard to the time of the first execution of the instrument. The Act is entirely silent as to the last execution of it. It leaves that entirely open. Again if it was intended that the information to be given by registration should include all the creditors one would expect to find some provision that the deed should enumerate the creditors who were to be paid ; but the form of the deed is left absolutely open by the Statute. It need not mention the creditors at all by the schedule or otherwise and any instrument which conveyed the property to a trustee requiring him to pay creditors and leaving him to find out who they were would be within the scope of the Act and a copy of that would not furnish any information as to the creditors who they were, their addresses or the amounts they claimed. Again section 7 gives us an enumeration of the various particulars which are to appear on the face of the Register. The creditors do not appear on the Register. Nothing about them appears on the Register whether their names nor their addresses nor the amounts they claim. Therefore neither the register nor the deed discloses it. But how does the Statute contemplate that the creditors are to be got at ? In this way :—the names and addresses of the creditors are to appear from the affidavit of the debtor. But that affidavit is not to be disclosed to the public and therefore a person who goes and searches in the office has no means of learning from that the names of the creditors which is to my mind a very strong indication that there was no intention that the system of registration should make the names and amounts of the creditors known to the public. But again the Statute requires that the affidavit of the debtor should state something about the liabilities. He is to state the estimated amount of his liabilities.

Now if it was required that every creditor should execute before the seven days expired stating of course the amount for which he executed according to the ordinary practice and the debtor is estopped from denying that amount and the creditor is estopped

from claiming, any more, you would know the amount of the liabilities for which the deed was to stand and you would not want the estimated amount. The fact that they have to be estimated is to my mind very strong indeed to show that they need not be definitely ascertained at the date of the registration. I come therefore plainly to the conclusion that the Statute was not intended to alter the law and practice with respect to such instruments as it existed before. It was no part of the scheme of the Act that the creditors should be ascertained at the date of registration; that the instrument was a conveyance of the legal estate not avoided either by the Statute or common law or by what took place subsequently and consequently that the legal estate was in Mr. Milne; that he had a right in respect of that to appear and show that he was not deprived of it by the subsequent bankruptcy. For these reasons I am not able to agree with the conclusions of the learned judges in the Divisional Court and I think that the appeal must be allowed and the bankruptcy order discharged.

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I have very few words to add as the matter has been so exhaustively dealt with; but the question in the case is whether this deed is registered in compliance with the Act of 1887. The material objection which is taken is this, that the deed produced is not the same deed as the deed registered because there is an addition to it, that addition being the execution by certain creditors after registration. It is said that is a material alteration which avoids the deed. Now nothing that has been done subsequent to registration to my mind alters the contract contained in that deed. What has been done subsequently is simply that which is contemplated by the deed and so far in my opinion from altering the deed it carries it out effectively. I think therefore that there has been no material alteration such as would make the deed produced a different deed from the deed registered and so avoid it. The deed produced and the deed registered are the same. With regard to the registration I can see no provision in the statute with regard to registration which has not been complied with. Mr. Mackenzie in his argument relied very much on sub-section (1) of section 6 and

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he relied on these words, "A true copy of the deed and of every schedule or inventory thereto annexed or therein referred to." Now in my opinion these words "schedule or inventory thereto annexed or therein referred to" mean schedule or inventory existing at the time of the registration of the deed and do not mean a completed schedule. Mr. Milne has therefore in my opinion a *locus standi* and if he has a *locus standi* he is a party aggrieved and he is entitled to raise the point that there is no good petitioning creditors' debt upon which to found a receiving order.

I am of opinion, therefore, that the receiving order was bad and the appeal ought to be allowed.

Appeal allowed with costs.

Solicitors: *Burn & Berridge*, agents for *H. C. Trapnell*, Bristol, for Mr. Milne.

The Solicitor to the Board of Trade, for the Official Receiver.

PRACTICE.

IN RE WENDT, EX PARTE THE OFFICIAL RECEIVER.

COURT OF APPEAL.

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FRY, L.J.,
LOPES, L.J.1889.
April 12th.*Bankruptcy Act, 1883, section 17.*
Bankruptcy Rules, 1886. Rules 184, 185, 186.

Jurisdiction—Debtor out of Jurisdiction of Court—Power to Direct Service of Order to attend Public Examination.

The Court has no jurisdiction under the Bankruptcy Act, 1883, to direct service on a debtor who is out of the jurisdiction of an order requiring him to attend for public examination.

THIS was an appeal on behalf of the official receiver acting as trustee in the bankruptcy of *E. H. Wendt*, from an order of Mr. Registrar Linklater refusing leave to serve out of the jurisdiction of the Court an order on the debtor directing him to attend for public examination.

In 1887 the debtor *Wendt* was adjudicated a bankrupt, the act of bankruptcy alleged in the petition being that specified in section 4 sub-section 1 (d) of the Bankruptcy Act, 1883:—viz. that he had departed and remained out of England with intent to defeat or delay his creditors.

The debtor was now at Antwerp, and the official receiver desired to serve the order to attend for his public examination upon him there.

The Registrar expressed his willingness to make the order asked for if he had jurisdiction to do so, but he came to the conclusion that he had no jurisdiction.

From that decision the official receiver appealed.

Muir Mackenzie: for the Official Receiver.

The question is entirely one of jurisdiction. The registrar said that if he had had the power to make the order he would have made it. The object of the order is that if the debtor came within the jurisdiction he could be at once arrested. In the absence of any order there would be certain preliminaries to be gone through

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which might give him the chance of getting away again. The order would be futile if he never came within the jurisdiction. In the absence of the debtor the public examination was adjourned *sine die*. He is known to be at Antwerp and could be served there perfectly well. By section 127 of the Bankruptcy Act, 1883, a power is given to make revoke or alter general rules for carrying into effect the objects of the Act which "shall be judicially noticed and shall have effect as if enacted by this Act."—"Provided always that the said general rules so made, revoked or altered, shall not extend the jurisdiction of the Court." By Rule 179 of the Bankruptcy Rules 1886 "The official receiver shall cause a copy of the receiving order sealed with the seal of the Court to be served on the debtor" and by Rule 184 "When a receiving order has been made against a debtor, it shall be the duty of the official receiver to make an application to the Court to appoint a day and hour for holding the public examination of the debtor, and, upon such application being made, the Court shall by an order appoint the day and hour for such public examination, and shall order the debtor to attend the Court upon such day and at such hour." By Rule 185 "If the debtor fails to attend the public examination at the time and place appointed by any order for holding or proceeding with the same, and no good cause is shown by him for such failure, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that the order requiring the debtor to attend the public examination was duly served, and without any further notice to the debtor to issue a warrant for his arrest as provided by section 25 (1) (d) of the Act, or to make such other order as the Court shall think just." And by Rule 186 "Where any order is made appointing the time and place for holding the public examination of a debtor, the official receiver shall serve a copy thereof on the debtor, and shall give to the creditors notice of such order, and of the time and place appointed thereby. The official receiver shall also send a notice of such order to such local paper as the Board of Trade may from time to time direct, or in default of such direction as he may think fit, and shall forward notice of such order to the Board of Trade to be gazetted." The rules say that the notice is to be served but they do not say that it may be served out of the jurisdiction. Under the old act the

debtor was required to attend, but here the rules say the Court " shall order the debtor to attend." It is quite clear that a petition can be served out of the jurisdiction, for by Rule 156 it is provided that " Where a debtor petitioned against is not in England the Court may order service to be made within such time and in such manner and form as it shall think fit." The same in the case of a bankruptcy notice by Rule 141.

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THE MASTER OF THE ROLLS (LORD ESHER) :

I think the rule of construction is clear that whenever Parliament Judgment, enacts anything to be done by one of the Queen's Courts the meaning is that Parliament has only enacted that the Court may do that thing within the Queen's dominions—that is within the jurisdiction of the Court—unless Parliament enacts that it can be done out of the jurisdiction of the Court. If Parliament says that it may be done out of the jurisdiction, the Court must do it out of the jurisdiction. Here there is no express enactment and the rule I have stated applies and it is that the thing can only be done within the Queen's dominions.

FRY, L.J., and LOPES, L.J., concurred.

Appeal dismissed.

Solicitor : *W. W. Aldridge*, for the Official Receiver.

BEFORE
MR. JUSTICE
CAVE.
1889.
April 3rd.
and 17th.

*Bankruptcy Act, 1883, section 55 and section 97, sub-section (3).
Bankruptcy Rules, 1886, Rules 27, 28.*

*Special Case—Disclaimer of Lease—Application for Vesting order—Service of
Notice by Lessor—Evidence—Right to Order.*

Where application is made by a trustee in bankruptcy for leave to disclaim a lease the lessor is entitled as soon as he is served with notice of the trustee's application to serve notice of motion for a vesting order upon the parties interested and he need not wait until leave to disclaim has been actually given ; but in such case the lessor will run the risk of having his motion dismissed with costs if leave to disclaim is refused, or if it should prove that notwithstanding leave to disclaim being given the lessor is not entitled to a vesting order.

Whether an affidavit or other evidence is required in support of the notice of motion by the lessor is a matter for the Judge whose duty it is to see that the respondents are not taken at a disadvantage by reason of their ignorance of the terms of the option which is offered to them.

As a general rule if the lessor succeeds in bringing himself within the provisions of section 55, sub-section (6), of the Bankruptcy Act, 1883, the Court after giving leave to disclaim ought to make a vesting order on his application, but such rule may be subject to exceptions.

THIS was a Special Case stated by the judge of the Birmingham County Court pursuant to section 97, sub-section (3) of the Bankruptcy Act, 1883, for the opinion of the High Court of Justice in the following form :—

“ 1. This case arises out of an application for vesting orders consequent upon a motion by the trustee for leave to disclaim the two leases of 1798 and 1887 hereinafter mentioned and which are to be referred to as part of this case.

2. The motion for leave to disclaim came on for hearing on December 18th, 1888. The motion was adjourned in order that the lessor might apply for vesting orders, and that all parties interested in the said leases might be before the Court. On

January 2nd, 1889, the lessor served notices of motion on all parties claiming to be interested in the property sought to be disclaimed. The said notices claimed that the said parties should be excluded from all interest in, and security upon, the property so disclaimed unless they should then and there declare their option to consent to an order vesting the property comprised in the said leases upon the terms of their being subject to the same liabilities and obligations as the bankrupt was subject to under the said leases at the date of the petition.

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8. At the adjourned hearing on January 17th, 1889, leave to disclaim the said leases was given to the trustee. Certain of the parties served with the said notices by the lessor, did not appear, and as against them an order was made excluding them from all interest in the property disclaimed and as against them vesting it in the lessor. The other parties served who appeared, raised various contentions, which are now submitted to the High Court pending which the said motions stand adjourned.

The material facts are as follows :—

4. By a lease dated September 7th, 1793, The Reverend Thomas Lane as Rector of the Parish Church, Handsworth, leased to Thomas Southall, 5 acres 2 roods and 20 perches of glebe land on a building lease expiring on June 21st, 1892, reserving a rent of 21*l.*, and containing a covenant on the part of the lessee to repair.

5. On July 10th, 1885, a part of the said land comprising 3 roods 8 perches was taken compulsorily by the London and North-Western Railway Company, and the ground rent apportioned in the sums of 17*l.* 5*s.* 3*d.* for the land not taken, and 8*l.* 14*s.* 9*d.* for the land taken by the company. This last portion of the land need not be further considered in this matter.

6. On October 31st, 1887, the lease of the remainder of the land (other than that taken by the said Railway Company) was assigned to the bankrupt subject to the apportioned ground rent of 17*l.* 5*s.* 3*d.* and subject to an underlease dated July 21st, 1794, which had been granted, but with the benefit of an improved ground rent of 27*l.* 10*s.* reserved by such underlease.

7. By the said underlease dated July 21st, 1794, Thomas Southall the said lessee underleased 4 acres 3 roods and 12 perches

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of the land mentioned in paragraph 4 to John Wadhams at an improved ground rent of 27*l.* 10*s.* and expiring on June 16th, 1892.

8. Of the said 4 acres 3 roods 12 perches mentioned in the last paragraph, by an assignment dated March 19th, 1885, 2 acres 2 roods called Whitehall were assigned to Jacob Biggs for the residue of the term granted by the said underlease to John Wadhams and expiring on June 16th, 1892, rent free, but subject to the lessee's covenants and conditions contained in the said underlease of June 21st, 1794. The said John Wadhams and his successors in title granted sub-leases, at ground rents, of portions of the property comprised in his said underlease of 1794 to, amongst others, the various persons, or their predecessors in title, whose names herein-after appear; which sub-leases are still subsisting.

9. Such part of the land included in the said underlease of July 21st, 1794, as was not assigned to Jacob Biggs as aforesaid, was on March 25th, 1887, assigned to William Clarke, subject to the aforesaid sub-leases and the ground rent of 27*l.* 10*s.* reserved by the underlease of July 21st, 1794, but with the benefit of improved ground rents reserved by the sub-leases.

10. The sub-lessees referred to in the last paragraph and who are now interested in this matter are as follows:—

* * * * *

11. The Revd. William Randall, D.D., Rector of the Rectory and Parish Church of Handsworth, had prior to November 1st, 1887, succeeded the Revd. Thomas Lane as Rector, and as such Rector was entitled, as part of his glebe to the reversion expectant upon the lease of September 7th, 1793.

12. On November 1st, 1887, the bankrupt as assignee of the lease of September 7th, 1793, subject to the underlease of July 21st, 1794, and the sub-leases hereinbefore mentioned, accepted a fresh lease, dated November 1st, 1887, from the said Revd. William Randall, D.D., Rector of the Rectory and Parish Church of Handsworth of 10,510 yards of land, being the land mentioned in paragraph 9, that is to say, the land comprised in the underlease of July 21st, 1794, to the said John Wadhams, and which was not assigned to Jacob Biggs by the assignment of March 19th, 1885.

On behalf of the lessor it was contended:—

(a) That as soon as he had been served by the trustee with notice of motion for leave to disclaim, he was entitled to serve upon parties interested in the property, notices calling upon each of them severally to accept a vesting order, or that, in the alternative, an order should be made vesting the property in him and excluding them from all interest in the same, so that all parties interested might be before the Court, and upon leave to disclaim being given the whole matter might be dealt with at one hearing. On behalf of some of the parties on the other side, it was contended that, having regard to the terms of section 55, sub-section (6) of the Bankruptcy Act, 1883, no notice of application for a vesting order can be served until leave to disclaim has been granted.

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(b) On behalf of the sub-lessees it was further contended that under Rules 27 and 28 of the Bankruptcy Rules, 1886, such application by the lessor must be supported by affidavit, or other evidence, and that the affidavit or other evidence must set forth or show the terms of the original lease or leases the liabilities and obligations of which the sub-lessees were to become subject to in the event of their electing to accept a vesting order. The lessor contended that this application did not require to be supported by affidavit or other evidence, inasmuch as it was merely consequential on, and subsidiary to, the motion by the trustee.

(c) It was further contended on behalf of the sub-lessees that the Court might in its discretion refuse to make any order on the lessor's application. The lessor contended that upon this application being duly made the Court was bound to make an order putting the parties interested to their election.

(d) It was admitted by the lessor, abandoning to this extent the claims contained in his notice of motion, that none of the liabilities and obligations of the new lease of November 1st, 1887, could be imposed upon persons who were interested in the property prior to that date, and did not claim under the new lease; but subject thereto, it was contended by the lessor that, if the sub-lessees elected to take orders vesting the property in them, the Court should not impose any terms or conditions, and should not apportion the liabilities and obligations of the bankrupt, but that each sub-lessee, in the event of there being two or more sub-lessees holding interests in separate portions of the disclaimed property,

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must take his vesting order subject to all liabilities and obligations of the bankrupt in the whole property. This was denied on behalf of the sub-lessees, who contended that the Court should, if it made any order, impose conditions, and could declare whether they should hold as assignee from the bankrupt or in the same character as the bankrupt, or any other terms and conditions as might seem just.

(e) Certain of the sub-lessees contended that in consequence of the surrender by operation of law of the lease of 1798 under which they respectively held, they were not, subject to the liabilities and obligations to which the bankrupt was subject in respect of the said property at the date when the bankruptcy petition was filed ; and ought not to be excluded from their respective interests in the securities upon the said property although not consenting to be subject to the liabilities and obligations of the lease of 1798.

The questions of law for the opinion of the High Court are :—

1. Whether upon an application by the trustee for leave to disclaim a lease the lessor can serve notice of motion for a vesting order on the parties interested or, whether no such notice of motion can be served until leave to disclaim has been given.

2. Whether, if such notice of motion by the lessor can be so served ; it must necessarily be supported (a) by affidavit ; or (b) if not, then by other evidence.

3. Whether if and when an affidavit, or other evidence by the lessor is requisite, it must set forth, or show the terms of the lease or leases under which the bankrupt held, and the liabilities and obligations to which the sub-lessees may become subject, or any of them.

4. Whether on an application being duly made, the Court must, after giving leave to disclaim, make a vesting order, or, whether it may decline to make any order on the lessor's application.

5. Whether the lessor is entitled to call on the under-lessee, or each of the under-lessees severally, unconditionally to accept or refuse a vesting order, or vesting orders ; or whether the Court can impose terms and conditions, and can declare whether a sub-lessee is to hold as assignee from the bankrupt, or in the same character as the bankrupt, or on such other terms and conditions as may seem just.

6. Whether, if the Court cannot in its discretion impose conditions, it can nevertheless apportion the liabilities and obligations of the bankrupt in the event of there being two or more under-lessees.

7. Whether the contentions of the sub-lessees, set forth in paragraph (e) are well founded and applicable to the facts of this case; and whether they are subject to any, or if any which, of the covenants or conditions of the said lease of 1793 and whether they can be ordered in terms of the notices mentioned in paragraph 1, to be excluded from all interest in, and security upon, the property disclaimed (which includes their holdings) unless they consent to an order vesting their respective portions of the property in the lease of 1793 in them on the terms mentioned in the notices, notwithstanding such surrender by operation of law, of the former lease as mentioned in paragraph 12."

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Muir Mackenzie: for the Board of Trade stated the case.

April 17th.

CAVE, J.:

This case is a somewhat complicated one, and requires a careful attention to dates in order that it may be thoroughly understood. Judgment. On September 7th, 1793, the Rector of Handsworth granted Southall a lease of 5 acres 2 roods 20 poles of land for a term expiring June 21st, 1892. So far we have only two parties, the Rector who is the lessor and Southall who is lessee. On July 21st, 1794, Southall sub-leased 4 acres 3 roods 12 poles to Wadham for a term expiring on June 16th, 1892. Henceforward we have three parties. The Rector the lessor, Southall the lessee, and Wadham the sub-lessee. We need not trouble ourselves about Wadham's sub-lessees at present. On March 19th, 1885, part of the sublease of 1794 was vested by assignment in Biggs, and on March 25th, 1887, the residue was vested in Clarke. On October 31st, 1887, the lease of 1793 became vested by assignment in the bankrupt Britton. At the conclusion of this transaction the parties are as follows: the then Rector assignee of the reversion of the lease of 1793, the bankrupt the assignee of the lease of 1793 and Biggs and Clarke assignees in divided parts of the lease of 1794. On November 1st, 1887, the bankrupt took a new lease

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of so much of the land demised by the lease of 1794 as was not included in the assignment to Biggs. This effected a surrender by operation of law of so much of the land as was covered by the new lease, and at the same time operated as a new demise by the Rector. Taking these operations separately, the effect of the surrender was that the Rector became by virtue of the 8 & 9 Vict. c. 106, section 9 entitled to the reversion expectant on the determination of Clarke's interest in the lease of 1794 and entitled to enforce the provisions of that lease against Clarke, and liable to have them enforced by Clarke against him. This position was of course only momentary for the lease of November 1st, 1887, which operated as a surrender of so much of the land included in the lease of 1793 as was also included in the lease of November 1st, 1887, also operated as a demise by the Rector of that land subject to the sublease of 1794. For the moment by virtue of the surrender, the parties were reduced to two, the Rector the reversioner expectant on the determination of the lease of 1794, and Clarke the lessee. The ultimate effect of the demise of 1887 was to get rid of the lease of 1793 *quoad* Clarke's interest, and to leave Clarke the lessee under the lease of 1794 with the bankrupt as the immediate reversioner by virtue of the demise of 1887 and the Rector as the ultimate reversioner. I do not gather from the special case that Clarke has ever surrendered, or forfeited his interest in the lease of 1794, still less that the sub-lessees have done so. Then comes the disclaimer which replaces the Rector in the position which he occupied momentarily on November 1st, 1887. He is now again *quoad* Clarke, the reversioner expectant on the determination of the lease of 1794 and is entitled to enforce the obligations of that lease on Clarke, and when the rent reserved thereby has been apportioned to distrain for such apportioned part on the persons actually in possession of the land included in Clarke's share. If the Rector wants no more than this, the law gives it him, and he does not want a vesting order. If he wants more he has no right to more. He can distrain for an apportioned part of the ground rent of 27*l.* 10*s.* reserved by the lease of 1794 and he can sue Clarke on the covenant to pay rent, as well as on the other covenants in the lease of 1794. As far as I can judge, the Rector seems to have asked for less than he was

entitled to,—at any rate as against Clarke—without any order. Still as it seems to me, the case is not within the section and the application should be dismissed as he has no right at all to compel the sub-lessees to come under any other liability to him than that which they are now under, that is the liability to have their goods distrained if the part to be apportioned of the rent of 27*l.* 10*s.* reserved by the lease of 1794, is not duly paid to him.

Some further complication has been introduced into this case by the order made by the learned Judge against those sub-lessees who did not appear. How the matter stands, with regard to that, I cannot say, without knowing more of the facts, and also of Clarke's position. Possibly these sub-lessees and Clarke may have all acquiesced in the orders, in which case the rent to be paid by Clarke for so much of the land as he retains will be proportionately reduced.

This disposes of the case, but I will answer the other questions. I see no reason why the lessor should not give his notice as soon as he is served with notice of motion for leave to disclaim, if he likes to take the risk of having his motion dismissed with costs if leave to disclaim is refused, or if it turns out, as here, that notwithstanding leave to disclaim is given he is not entitled to a vesting order. Whether an affidavit or other evidence is required is entirely for the Judge who will, of course, take care that the respondents are not taken at a disadvantage by not knowing the terms of the option which is offered them. As at present advised I think that if the lessor brings himself within the section he ought as a general rule, to have his order, but I cannot say that this is a rule to which there can be no exception.

The 5th and 6th questions I shall prefer to answer in the concrete when they arise, and not in the abstract.

As to the 7th question I have answered this already. The lease of 1793 is gone as to Clarke's land and Clarke is bound to the Rector by the terms of the lease of 1794 and the sub-lessees are bound to Clarke by the terms of their sub-leases. No order can be made on the sub-lessees and the Rector's motion should be dismissed.

Solicitor : *The Solicitor to the Board of Trade*, for the Board of Trade.

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IN RE
BRITTON.

PRACTICE.

COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
LINDLEY,
L.J.,
LOPES, L.J.
1889.

May 3rd.

IN RE BROCKELBANK, EX PARTE DUNN & OTHERS.

Bankruptcy (Discharge and Closure) Act, 1887, section 2, sub-section (3).
Bankruptcy Act, 1883, section 28, sub-section (2).

Discharge—Misdemeanour committed by Bankrupt—Duty of Court—Debtors Act, 1869 (32 & 33 Vict. c. 62), section 13, sub-section (1).

Section 2, sub-section (3), of the Bankruptcy (Discharge and Closure) Act, 1887, provides that on application by a bankrupt for his discharge the Court "shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part II. of the Debtors Act, 1869, or any amendment thereof."

Held: That the words must be limited to mean "in all cases connected with or arising out of the bankruptcy in question"; and where the alleged offence is in no way connected with the bankruptcy proceedings and does not affect the creditors or the property distributable amongst them the Court is not bound to enquire into it or to take it into consideration in granting the discharge.

Where in an Act of Parliament the Legislature has used language of so wide a character that if its full effect is given to it, it must lead to palpable injustice and will produce consequences revolting to the mind of any reasonable man, the Court will always endeavour, unless expressly prevented, to place upon such language a reasonable limitation on the ground that the Legislature could not have intended such consequences to ensue.

THIS was an Appeal on behalf of certain creditors of the bankrupt against an order of Mr. Registrar Brougham, by which he granted the bankrupt his discharge under the Bankruptcy (Discharge and Closure) Act, 1887.

The debtor *Thomas Brockelbank*, who carried on business as a ship and insurance broker, was adjudicated bankrupt on February 22nd, 1878, and in 1882 he was convicted of obtaining from Messrs. *Jackson & Graham* certain goods and furniture by false pretences and was sentenced to six years' penal servitude for the offence.

In 1888, after his release from prison, the bankrupt applied for his discharge under the Bankruptcy (Discharge and Closure) Act, 1887, but the application was opposed by certain creditors on the ground that the debtor had committed a misdemeanour under Part II. of the Debtors Act, 1869, whereby he was disentitled to his discharge by reason of section 2, sub-section (3), of the Bankruptcy (Discharge and Closure) Act, 1887, which provides that on the hearing of an application for discharge the Court may hear any creditor, and receive such evidence as the Court thinks fit, &c., and may either grant or refuse the order of discharge or suspend the operation of the order for a specified time, or grant the order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor or with respect to his after-acquired property;—“Provided that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part II. of the Debtors Act, 1869, or any amendment thereof.”

The registrar held that as the misdemeanour had been committed after adjudication although before the application for discharge, he was not bound to refuse the application, and he thereupon made the order granting the bankrupt his discharge.

From that order certain creditors now appealed.

Sidney Woolf: for the creditors.

The registrar had no power to grant the discharge in this case. The bankrupt had brought himself within the provisions of section 2, sub-section (3), of the Bankruptcy (Discharge and Closure) Act, 1887. He had committed a misdemeanour under Part II. of the Debtors Act, 1869. The misdemeanour was under section 18, subsection (1), of the Debtors Act, 1869, which provides that a person shall be deemed guilty of a misdemeanour and on conviction shall be liable to imprisonment “If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud.” It is immaterial that the offence for which the debtor was actually indicted was the statutory one of obtaining goods by false pretences and not that of obtaining credit. Section 2, sub-section (3), of the Bankruptcy (Discharge and Closure) Act,

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1887, is copied from section 28, sub-section (2), of the Bankruptcy Act, 1883. Similar words occur there and they are quite general in terms. The proviso is general and applies not only to misdemeanours before adjudication but to misdemeanours before closure. (Counsel referred to *Reg. v. Rowlands*, L. R. 8 Q. B. D. 530 : 51 L. J. M. C. 51 : 46 L. T. 286 : 30 W. R. 444. *Reg. v. Peters*, L. R. 16 Q. B. D. 636 : 55 L. J. M. C. 173 : 54 L. T. 545 : 34 W. R. 899.)

The debtor appeared in person but was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

This seems to me to be one of those cases in which the Legislature has used language of the widest kind and has used language so wide that if you give to it its grammatical and full effect it will palpably produce injustice and will produce consequences so enormous that any reasonable man must revolt from them. When the language of the Legislature does carry such consequences the Court has over and over again acted on the view that the Legislature could not have intended to produce that which is palpably unjust and to produce effects which will revolt the mind of any man of ordinary feeling. At any rate the Legislature is not to be supposed to do that by general words. Let us concede a case which is the necessary consequence of the argument here. Suppose a boy of thirteen gets credit for his toys or for cakes at a pastrycook's by some false pretence as for instance by saying that his father had told him he might pledge his credit, and forty years afterwards when this lad has grown up to be a man and has been in business and obtained a good character, but has become through circumstances over which he has no control liable to the bankruptcy law, is it to be supposed that then the Legislature has said that the Bankruptcy Court is bound to go into the question of what was done at thirteen, and if it finds that it is true the Court has no discretion but is bound to refuse the discharge? If it were so in the first place it would be a cruel injustice; and in the second place it would produce a consequence which would revolt the mind of any reasonable man. It is a thing too wicked for the Legislature to have intended and I cannot come to the conclusion that the Legislature did intend it. The words therefore must be limited. We

have not to construe section 13 sub-section (1) of the Debtors Act, 1869, but we have to construe the words of section 2 sub-section (3) of the Bankruptcy (Discharge and Closure) Act, 1887, which run :—"Provided that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part II. of the Debtors Act, 1869, or any amendment thereof." We must not construe the section as if it had nothing to do with bankruptcy. The question is what is the meaning of the words "in all cases." Can those words include the case I have just put? No, they cannot. Then the words "in all cases" must be limited, and the meaning is "in all cases which are cases in any matter connected with or arising out of the bankruptcy in question." That is a reasonable limitation. The obtaining false credit must be in a matter relating to the bankruptcy in question. The misdemeanours alluded to must have reference to some matter connected with or arising out of the bankruptcy proceedings. Such a reasonable limitation shuts out what comes after the adjudication and which is not connected with the bankruptcy proceedings as well as what occurred before in matters not brought under the purview of the adjudication in any way. Here what was alleged to be done after the bankruptcy was with regard to persons who could not come in under the bankruptcy. It was not connected with the bankruptcy at all. It was a matter not connected with or arising out of the proceedings which were before the registrar, and he had no power to inquire into it. The registrar exercised his discretion in granting the debtor his discharge and this Court will not interfere with his decision.

LINDLEY, L.J. :

I am of the same opinion. If Mr. Woolf's contention is right the Bankruptcy Court would have to consider the whole conduct of a debtor who applied for his discharge from the time he came to the age of discretion. The Legislature has used very wide words but I flinch from giving those words their wide sense. We must reasonably look to the subject matter of the legislation in question and the leading idea limits the object which the Legislature meant when it used the words. Where there is something which affects the creditors or something which affects the property distributed

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that is a matter which has to be inquired into, and unless the inquiry relates to matters and property affecting the creditors in the proceedings the Bankruptcy Court has nothing to do with it. To say that the registrar is bound to inquire whether the bankrupt has committed some offence with which the creditors have nothing to do whatever is putting on the Act a construction which I cannot think was intended.

LOPES, L.J.:

The words of this section are so wide that they would be unjust unless some limitation were put upon them. The Act in question has to do with bankruptcy. It has to do with creditors under a bankruptcy and with the property and it gives jurisdiction in such matters—that is, matters connected with and arising out of the bankruptcy. It is as if one should read after the words “in all cases”—“namely in any matter connected with or arising out of any bankruptcy.” Here what occurred was outside the bankruptcy and the appeal must be dismissed.

Appeal dismissed.

Solicitor: *C. A. Clulow*, for the creditors.



PRACTICE.

IN RE LANE, EX PARTE GAZE.

Bankruptcy Act, 1883, section 48.

Fraudulent Preference—Payment made with intention of reviving Statute-barred Debt.

A payment made by a debtor within three months of his bankruptcy with the intention of reviving a real debt and not with a view of preferring one creditor before others, is not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

In 1862 the sum of 3,000*l.* was bequeathed to trustees in trust for a person for life and after his death such sum was to be divided between his two children.

In 1876 the beneficiaries agreed that the money should be paid over to the person entitled for life for the purpose of being advanced to the bankrupt, who was the husband of one of the children.

In 1879 the bankrupt ceased to pay interest, but in 1888 being in difficulties he sent a sum of 5*l.* to the person entitled for life with the express intention of reviving the debt of 3,000*l.* having regard to his possible bankruptcy.

A proof subsequently tendered in the bankruptcy in respect of the loan was rejected by the trustee on the ground that the debt was barred by the Statute of Limitations and that the payment made being a fraudulent preference it could not operate to revive the debt.

Held: That the intention of the bankrupt being to revive an honest debt and not to prefer one creditor before others, the proof must be admitted.

THIS was an Appeal on behalf of the trustee in the bankruptcy from an order of the judge of the Norwich County Court by which he reversed the decision of the trustee rejecting two proofs which had been tendered against the estate, and ordered that the said proofs should be admitted.

By the will of one *Jenner Lane* who died in 1862 a sum of 3,000*l.* in Consols was bequeathed to trustees for the benefit of *John Frampton* and his wife for life, with remainder to their children *William Frampton* and *Mrs. Alicia Lane*.

In June, 1876, after the death of *Mrs. Frampton* but *John*

DIVISIONAL COURT.

BEFORE
FIELD, J.,
AND
CAVE, J.
1889.

*May 13th
and 14th.*

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 IN RE
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Frampton being still alive, a deed was executed by which the trustees were released under an indemnity and were requested with the consent of all the parties interested to pay over the 3,000*l.* to *John Frampton* for the purpose of being advanced to one *Lancelot Lane*, the husband of Mrs. *Lane* who was one of the beneficiaries.

The sum of 2,958*l.* 11*s.* 0*d.* being the amount realised, was accordingly advanced to *Lancelot Lane* who paid interest on the same at 4 per cent. to *John Frampton* for two or three years, but from April 1879 up to January 1888 no interest was paid.

In January, 1888, the sum of 5*l.* was sent by *Lane* to *John Frampton* together with a letter which had been destroyed but which stated that the payment was made on account for the express purpose of acknowledging the debt and with the object of preventing any doubt arising as to the indebtedness in case of bankruptcy.

In February, 1888, a receiving order was made against *Lane* upon which he was adjudicated bankrupt. A proof tendered against the estate by *John Frampton* for the value of his life interest in the 3,000*l.*, together with a further proof by *William Frampton* and Mrs. *Lane* for the value of the reversionary interest in the same sum, was rejected by the trustee on the ground that the debt was barred by the Statute of Limitations and that the payment of the 5*l.* being a fraudulent preference could not operate to revive it.

The County Court Judge subsequently allowed the proofs and referred the matter to the registrar to ascertain the value of the life interest and of the reversionary interest respectively.

From that order the trustee now appealed.

R. V. Williams, Q.C. (Poyser with him): for the trustee.

I contend that this debt was barred by the Statute of Limitations; and also that so far as the wife's interest is concerned it amounted to a reduction into possession and therefore there can be no proof. *Prima facie* if this is a debt for money lent it is barred by the statute. But it is said that in January, 1888, the bankrupt paid this sum of 5*l.* It was by a cheque sent in a letter to *John Frampton*, but the letter is not forthcoming. *John Frampton* in his affidavit states he thinks he must have burned it in his annoy-

ance at the amount sent being so small, but a receipt was sent to the debtor. It is said that that letter and payment is sufficient acknowledgment to get rid of the statute. But at the time the bankrupt sent the money he was hopelessly insolvent and he sent the money as he says so that if he became bankrupt his relations might not be barred by the statute. The payment of the 5*l.* was a fraudulent preference and a fraudulent preference is now an act of bankruptcy. A person cannot by an act of bankruptcy so acknowledge a debt as to revive a claim against his estate. A debtor could not acknowledge a debt after an act of bankruptcy and that which is true after an act of bankruptcy is equally true of the act of bankruptcy itself. The payment of the 5*l.* under the circumstances was an act of bankruptcy and as it was so it is void altogether. The transaction was done for the one purpose that the bankrupt wished to assist his relations even though at the expense of his creditors. The intention was to put these creditors in a better position than the other creditors generally. My submission is that you prefer a creditor within the meaning of section 48 of the Bankruptcy Act, 1889, if your object is to put that creditor into a better position than creditors generally are. Here there is an estate to be distributed and the object of the bankrupt is that the ordinary course of distribution shall be altered and altered in favour of his relations. The words of section 48 are "with a view of giving such creditor a preference over the other creditors." Everything which is done to put the body of creditors in a worse position than they would have been is a preference. The effect of these proofs if they stand is to reduce the dividend by one half.

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Yate Lee: for the creditors was not called upon.

FIELD, J.:

The facts of this case are somewhat unusual. We gather them Judgment from the affidavits which have been made by the bankrupt and by John Frampton and from their cross-examination by the trustee in the Court below. This sum of 8,000*l.* in Consols was bequeathed to trustees for the benefit of John Frampton and his wife and whosoever should be the survivor, for life and the reversion to William Frampton and Alicia Lane. The wife of the respondent John

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Frampton died and he became entitled to the life interest in these Consols. In 1876 the bankrupt Lancelot Lane was desirous of purchasing a farm for 10,000*l.* but he had not sufficient money to pay for it. He therefore induced his relations to concur in the sale of the 3,000*l.* Consols and to advance the sum of money to him. Now on the evidence it appears that the money was invested in the purchase of this farm which was afterwards sold at a profit, the bankrupt receiving the money. There seems to have been some talk about a re-investment, but no re-investment was made and about 1878 Lane became involved in litigation and with the sanction of all the parties the 3,000*l.* was allowed to remain in his hands as a loan at 4 per cent. After April, 1879, Lane ceased to pay interest but I think there is a letter dated 1884 in which he admits that this is a loan and says that if his relations so wish he will sell himself up and pay them. Then in 1888 the bankrupt saw that if the decision in a Chancery action in which he was engaged should be adverse to him he could not pay his debts, and so he wrote a letter which has been lost but the effect of which was that he sent a cheque for 5*l.* and said that his object in doing so was to prevent any doubt arising as to the indebtedness in case of bankruptcy. The payment of 5*l.* was made, and it is contended by the respondents that the 5*l.* being a payment made on account of a larger debt was an admission of the debt the effect of which was to revive the remedy which had been barred by the Statute of Limitations. If this had been a mere sham between the parties any such effect of the payment would have been destroyed, but there is no evidence that it was a sham or that it was anything otherwise than what was intended viz.—that a debt being honestly due the creditor should not be deprived of his remedy because for family reasons and a desire not to destroy his daughter's home he had abstained from taking coercive measures. If that is so the question is whether the payment revived the debt? It is clear that if instead of making the payment of 5*l.* the bankrupt had given a written acknowledgment it would have been a valid transaction. But then it is said that this payment ought not to be held to have effect because it is a payment which falls within section 48 of the Bankruptcy Act, 1883. Section 48 says "Every conveyance or transfer of property or charge thereon made, every pay-

ment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy." No doubt there was a payment made here and that the person who made the payment was adjudicated bankrupt within three months. The question is whether the payment which would otherwise revive the debt is not to have that effect on the ground that it is a fraudulent preference. That depends on the intention with which it was made. The question is whether it was made with a view to prefer this creditor over the other creditors. What was the view of the parties here? If it had been a payment of 1,000*l.* or other large sum I should have been inclined to say it was a fraudulent preference, but to come within the section we must be of opinion that it was done with a view to prefer this particular creditor over the other creditors. Now what was the view? The money was honestly due. The other creditors have had the advantage of the bankrupt having a large sum of money obtained from his relations to deal with in his business; and the money being honestly due the intention was in itself to revive a remedy. Was that void as against the other creditors? I think not. I think the payment did revive the remedy. It is not a case within section 48 and the debt is not barred.

CAVE, J.:

I am of the same opinion. Mr. Vaughan Williams has made three points which it is necessary to consider. In the first place he says that this payment of 5*l.* was a payment by way of fraudulent preference within section 48 of the Act. In order to test the value of that suppose that a motion had been made for an order on Mr. Frampton to pay this sum of 5*l.* Now what would have been the result of that motion? Can it be pretended for a moment that this sum of 5*l.* was paid with the view that as to that sum

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the creditors should have been placed in a different position to that in which the other creditor was placed. Undoubtedly the creditor would be placed in a different position with regard to that very sum of 5*l.* for as to that sum he would get payment of the whole instead of having to take a dividend but it is equally clear that that was not the intention with which the payment of the 5*l.* was made and it has been held over and over again that such payment must have been made with a view to fraudulent preference and it is not enough that preference follows. In the case of *Ex parte Taylor*, *In re Goldsmid* (L. R. 18 Q. B. D. 295 : 56 L. J. Q. B. 195 : 35 W. R. 148), where a man on the verge of bankruptcy paid a sum of money to a creditor out of which he had defrauded him, doing so not with a view of defrauding the other creditors, but with a view of saving himself from exposure or a criminal prosecution, the Court of Appeal held that that was not a payment made to a preferred creditor within section 48. So again in *In re Mills*, *Ex parte Official Receiver* (see *ante*, Vol. 5, p. 55 ; 58 L. T. 871), in which a debtor on the verge of bankruptcy paid a sum of money to a creditor. It was not done with a view of conferring a benefit over the other creditors, it was done with a view to give the benefit to the debtor's surety who would have been compelled to pay the money if the bankrupt had not done so, and it was held that inasmuch as the object was for the benefit of the surety and not for the benefit of the creditor, that was not within the section. It seems to me therefore clear that if a motion had been made for repayment of this 5*l.* that motion must have been refused and the payment of the 5*l.* would have stood. Now if that concludes the case it is sufficient that a man should pay a sum of money for the purpose of reviving a debt that has been barred by the Statute of Limitations on the eve of bankruptcy, and can he do that in all cases? I say no, he cannot. But what must be established before you can set aside a payment of that sort is that it is a fraudulent payment, fraudulently made for the purpose of setting up a debt which is gone. I do not think that that kind of case comes within section 48, at all, but undoubtedly it does leave open the question of whether the payment is made fraudulently, or not, and undoubtedly if it revives a debt which everybody has treated as an old bygone debt which they do not expect to be paid off or

pressed for, and upon the eve of bankruptcy the debtor says to himself "Well I am going to become bankrupt. I never meant to pay these people and they never expected I should but now that my property is going to be divided amongst my creditors I may as well let them have a share with the rest as not, it will not do me any harm, and will make friends of them," and if he therefore makes a payment of that sort for the purpose of reviving a debt of this kind, I have no hesitation in coming to the conclusion that that would be fraudulent and could not prevail against the rest of the creditors. But where there is a debt which has been treated all along as a good debt, but which the creditors, because of the relationship, have not pressed for, knowing perfectly well that the debtor would never set up the Statute of Limitations as against them, and when there comes a possibility that the power of saying whether the Statute of Limitations should be set up or not, passes from the debtor to some one else who would take a different view of the transaction, and the debtor considers that in all morality and interest he is bound not to leave the matter in that unsatisfactory state, but to give to the creditor the rights which it was never intended the creditor should be deprived of, and under the circumstances makes a payment of this sort then I say, that payment is not fraudulent and that it cannot be set aside as fraudulent. It seems to me on the facts of this case that those are the rules on which the County Court judge acted in coming to the conclusions to which he did and I see no reason for disturbing them on those points.

Then there remains the only other point that so far, at all events, as the wife's interest is concerned the bankrupt was entitled to retain the money as being a chose in action belonging to his wife which he succeeded in reducing into possession. But under the circumstances of this case there is nothing which would warrant us in coming to any such conclusion.

I am therefore of opinion that the order of the County Court judge was correct, that he came to the correct conclusion, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Bavon & Daynes*, Norwich : for the trustee.

S. Linay & Co., Norwich : for the creditors.

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BEFORE
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*May 18th and
16th.*

IN RE GORDON, EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy Act, 1883, section 54.

*Second mortgage—Bankruptcy of mortgagor—Right of second
mortgagees to growing crops.*

On August 19th, 1887, the debtor executed a legal mortgage of his freehold property, and on August 22nd, 1887, he executed a second mortgage deed by which he conveyed all his rights in the said property, subject to the first mortgage, to his bankers in order to secure his current account.

In April, 1888, judgment was recovered by the bankers in an action brought by them against the debtor, but on May 2nd, 1888, a receiving order was made against him and the official receiver subsequently became trustee in the bankruptcy.

In June, 1888, certain growing crops of hay became ready for cutting and on June 25th the second mortgagees put a man into possession.

By an agreement entered into on the same day between the second mortgagees and the official receiver the hay was afterwards cut and sold without prejudice to the rights of either party, and the official receiver claimed the proceeds as assets of the bankrupt divisible amongst his creditors.

Held: That the second mortgagees having gained lawful possession of the mortgaged land, they were entitled as against the trustee in the bankruptcy to the crops which afterwards matured.

THIS was an Appeal on behalf of the official receiver as trustee in the bankruptcy from an order of the judge of the County Court at Hastings by which he declared certain hay to be the property of Messrs. *Le Barbe & Daniels* as second mortgagees of the bankrupt's estate.

On August 19th, 1887, the debtor *Gordon* mortgaged his freehold property, known as the Ashley Arnewood Estate, to one *Hunt*; and on August 22nd, 1887, he executed a second mortgage of the property to Messrs. *Le Barbe & Daniels*, his bankers, in order to secure his current account which was very much overdrawn.

In January, 1888, demand was made by the second mortgagees for the money due to them, and on January 24th, 1888, a writ

was issued by them against the debtor upon which judgment was obtained for the amount claimed, and the sheriff put into possession.

On April 17th, 1888, a petition for a receiving order was presented against the debtor, and on the same day an order was made appointing the official receiver interim receiver of the debtor's property.

On May 2nd, 1888, a receiving order was made under which the official receiver subsequently became trustee. The sheriff remained on the property until May 4th when he went out of possession.

In June, 1888, certain growing crops of hay of considerable value became ready for cutting, and the official receiver was approached by the agent of the bankers with the result that an agreement was entered into on June 25th by which the hay was to be cut and stacked by the second mortgagees without prejudice to the position of the parties.

Previously on the same day—June 25th—the bankers as second mortgagees took possession of the property by putting a man named *Kittier* into possession.

The hay was cut and subsequently sold and application was made by the official receiver to the County Court for an order declaring that he was entitled as against the second mortgagees to the proceeds.

The County Court judge dismissed the application and from that order the official receiver now appealed.

E. Cooper Willis, Q.C. (F. C. Willis with him) : for the official receiver.

The question is what are the rights of the respondents as mortgagees of the equity of redemption? An equitable mortgagee has only certain rights. He is entitled to the growing crops and rents from the date of the order of sale, and he is not so entitled prior to the date of such order. When a man becomes bankrupt the equitable mortgagee has only a right to proceed in the Courts of Equity. He would be entitled to proceed in the Bankruptcy Court and ask for an order for sale. An equitable mortgagee has no right to the property at all until a Court of Equity has clothed

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him with it. (Counsel referred to *Ex parte Bignold*, *In re Harvey*, 2 G. & J. 278: *Ex parte Alexander*, *In re Tills*, 2 G. & J. 275: *Ex parte Bignold*, *In re Keer*, 2 Dea. & Ch. 398: *Ex parte Carlon*, *In re Birks*, 3 M. & A. 328: *Ex parte Burrell*, *In re Norman*, 3 M. & A. 439: *Garry v. Sharratt*, 10 B. & C. 717: Coote on Mortgage, pp. 435, 436.) Further the respondents here never took possession, or if they did it was unlawful. When an officer of the Court is in possession of property no one except a landlord who has his right of distress can enter against the officer without leave of the Court. The allegation is that on June 25th the respondents entered on the property. If they did then enter their entry was wrongful because the official receiver was previously in possession and it was property in possession of an officer of the Court. (Counsel referred to *Ex parte Cochrane*, *In re Mead*, L. R. 20 Eq. 282: 44 L. J. Bank. 87: 28 W. R. 726.)

Waggett (*S. Hall, Q.C.*, with him): for the respondents.

The official receiver claiming through the bankrupt has no better title than the bankrupt mortgagor himself. The mortgagor could not dispute the estate which he purported to confer on his mortgagees. He would be estopped by the form of the deed. The second mortgagees had a right to go into possession and they did so on June 25th. Although the law may be as the official receiver contends with regard to an equitable mortgagee who has allowed the mortgagor to remain in possession, it is not the case where an equitable mortgagee has availed himself of the right of possession. The first mortgagee stood on one side. (Counsel referred to *Ex parte Bignold*, *In re Postle*, 4 Dea. & Ch. 259: *Bagnall v. Villar*, L. R. 12 Ch. Div. 812: 48 L. J. Ch. 695: 28 W. R. 242.) The official receiver never in fact took possession of the crops. He did of the chattels and those were sold in August, and the official receiver then went out of possession. (Counsel also referred to *Morton v. Woods*, L. R. 4 Q. B. 293: 38 L. J. Q. B. 81: 17 W. R. 414: *Ex parte Punnett*, *In re Kitchin*, L. R. 16 Ch. Div. 226: 50 L. J. Ch. 212: 44 L. T. 226: 29 W. R. 129.)

May 16th.

FIELD, J.:

In this case the bankrupt was the owner of an estate called Ashley Arnewood, and the respondents to this appeal were his bankers, who had a large sum overdrawn. They brought an action to recover the money, and in April, 1888, obtained judgment, and the sheriff's officer was put into possession, but he afterwards went out. On April 17th, 1888, the official receiver was appointed interim receiver, and he also put a man into possession to guard his interest and that man remained in possession for a considerable time. A receiving order was made against the debtor and the proceedings terminated in bankruptcy, and the appellant here became official receiver and trustee. There was upon the estate some valuable hay, and the official receiver claims that hay as property of the bankrupt divisible amongst the creditors. The respondents dispute that and say that it belongs to them as mortgagees in possession under a deed of mortgage. The County Court judge has decided in favour of the respondents.

Now the facts are that on August 19th, 1887, the bankrupt executed a legal mortgage of his estate to a person named Hunt, and on August 22nd he executed another deed of mortgage to the respondents and that deed is the title of the respondents to this claim. The mortgagor having parted with the deeds of the property and all the estate to Hunt, had nothing left in him but a right to redeem the property at the amount of the mortgage. That thing which was once a right has become an estate capable of passing by assignment. What had the bankrupt in him after the deed of August 19th? He had this equitable estate, and by the consent of Hunt he had possession as mortgagor. His possession is a very weak one and it perhaps may be accurately expressed as a possession by sufferance which Hunt could at any time have determined. However it is clear by the deed of August 22nd that whatever the bankrupt had he passed to the respondents. He parted with all the property subject to the prior deed, and the deed contains a specific power of sale but such power is not to be executed until notice in writing has been given after default has been made. Now what was the position of Gordon after the

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execution of that deed. The respondents did not interfere with his possession. Therefore he still remains a tenant at the sufferance of two sets of people. That all occurred in 1887. Gordon, the bankrupt, was evidently in difficulties, and his difficulties culminated in the action by the respondents.

Now a question was raised as to whether or not in April, 1888, the appellant, the official receiver, entered into possession of anything and what. He did enter into possession of something it is clear. He entered into possession of the chattels. Whether that possession extended to the estate might be uncertain, but it seems to me unnecessary to consider it because the question really is, What was the possession, if any, of the respondents and the effect of it? The County Court judge has decided in favour of the respondents, but it is contended that the bankrupt having been left in possession of the land and in possession of the growing things the respondents cannot have any right to the things from the land without an order for sale. If this had been a legal mortgage that question would not arise, but it is said that this only conferred on the respondents an equitable estate which conferred no right to take possession unless an order for sale has been made. Several cases have been cited, but there is an essential distinction between those cases and the present one. Those were cases of equitable mortgage by deposit of deeds, not purporting to deal with the estate. In the case of *Ex parte Bignold, In re Harvey* (2 G. & J. 273), it was held that "An equitable mortgagee is entitled to the produce of the mortgaged estate from the time of presenting his petition for a sale." That case was decided on April 5th, 1827. But on June 10th, 1827, the case of *Ex parte Alexander, In re Tills* (2 G. & J. 275), came before Lord ELDON, and he does not appear to have been aware of the decision in *Ex parte Bignold, In re Harvey* (2 G. & J. 273), for he decided that "An equitable mortgagee is not entitled to the rents and profits of the mortgaged estate previous to the sale." So there were two conflicting decisions, both of great authority. Then a motion was made in the Court of Bankruptcy in 1832 in the case of *Ex parte Bignold, In re Keer* (2 Dea. & Ch. 398), and it was held that "An equitable mortgagee is entitled to the growing crops and rents from the date of the order of sale." Those cases were

relied upon by Mr. Cooper Willis, who says that the respondents are not entitled to have the growing crops because no order for sale was obtained. But the other side say that although that may be the law with regard to an equitable mortgagee who has allowed the mortgagor to remain in possession, it is not the case where the equitable mortgagees have availed themselves of the right of possession. In *Ex parte Bignold*, *In re Postle* (4 Dea. & Ch. 259), it was held that "In general an equitable mortgagee is not entitled to the rents, &c., prior to the date of the order for sale. But where prior to the bankruptcy the mortgagor absconds and the equitable mortgagee of part of the property takes possession of that part by an agent and a fiat issues against the mortgagor and then the solicitor to the commission, on behalf of the creditors, and the equitable mortgagee jointly appoint the same agent to manage the whole property which agent is subsequently adopted by the assignees. It was held that the mortgagee though he was also petitioning creditor was entitled to the rents, &c., from the time of his first taking possession." That case was followed by *Bagnall v. Villar* (L. R. 12 Ch. Div. 812 : 48 L. J. Ch. 695 : 28 W. R. 242), where "A mortgagor presented a petition for liquidation of his estate and the trustee appointed went into possession of the mortgaged lands and commenced cutting the growing crops. The mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do. In an action against the trustee an injunction was granted restraining him from cutting crops and from removing the crops cut after the demand made by the mortgagee." Therefore those two cases seem to be an authority if one is wanted. If you allow that all the interest of the bankrupt clearly passed to the respondents in 1887, all that was left to him was possession. If they did not interfere with the possession it carried with it the fruits of the land. If nothing had been done as to taking possession until the crop had been cut the stack would be a mere chattel. The question, therefore, is really one of fact: viz.—Whether the equitable mortgagees did before the cutting of the crop, while it was growing, determine the possession by sufferance which they had allowed the bankrupt to continue in so as to divest the estate. The evidence rests on that given by the solicitor's

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clerk and by Kittier who went into possession. The affidavit of Mr. Newman, the solicitor's clerk, states that about June 20th the crops were ripening, and he thereupon saw the solicitor acting for the bankrupt and the official receiver and showed him the case of *Bagnall v. Villar* (L. R. 12 Ch. Div. 812), telling him that the respondents were entitled to the growing crops. On June 25th possession was taken of the Ashley Arnewood property and of the growing crops by Kittier and the official receiver afterwards consented that the crops should be cut by the respondents without prejudice. Under those circumstances the respondents did cut the grass and stack the hay, and things went on until December when the vicar wanted his tithe and forwarded the usual notice to the bankrupt who sent it to the official receiver. But the official receiver forwarded it on to the respondents saying in effect "As you are in possession of the property, you must pay this." That has not been contradicted. Now the question is, Was the County Court judge right in saying that the equitable mortgagees had taken possession of the estate and had determined the possession by sufferance of the bankrupt and so entitled themselves to the profits of the land? In my opinion that was the true conclusion and the decision below was right.

CAVE, J.:

I am of the same opinion. The question is whether the trustee in the bankruptcy or the respondents are entitled to certain crops of hay. The law is I think clear that if the mortgagee of land gains lawful possession of the land he is entitled as against the mortgagor and his trustee in bankruptcy to the crops which may mature on the mortgaged land. That being so, three points were taken here. It was said that the second mortgagees never took possession. But it is clear from the documents that the second mortgagees did take possession on June 25th, and that the agreement entered into subsequently on that day only had reference to the dealing with the crop which would come off the land. Then it was said that even assuming that the respondents took possession was it a lawful possession? If it was unlawful it was of no good. I think when we construe the deed it is clear that the possession was a lawful possession. It does not seem to me to be necessary to

resort to the doctrine of estoppel in any way. The mortgagor conveys all his rights to the second mortgagees subject to the right of the first mortgagee. Under that deed the second mortgagees were entitled to take possession subject to the right of the first mortgagee, and as they took possession it was a lawful possession and they were entitled to the crops which afterwards matured. But then it was said that whatever the quality of possession ordinarily may be, in this case the trustee had previously taken possession and the taking possession was therefore a contempt of Court and was unlawful. Now I think the County Court judge must have come to the conclusion that the trustee had not taken possession of the land and I think rightly. The trustee had no interest in the land because it was mortgaged and his taking possession could not affect the rights of the mortgagees to the land itself. The only thing was that so long as the mortgagees abstained from taking possession there might be a crop which might go to the trustee. But his taking possession would not give him the right to that crop. I see no evidence that the trustee did take possession of the land as distinguished from the personal chattels. The personal chattels he did take possession of and he realised them. I should think he would not take possession of the real property and in my opinion he did not do so. The decision of the County Court judge was therefore right and ought to be affirmed.

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Appeal dismissed with costs.

Solicitors: *Coode Kingdon & Cotton*, agents for *Connell & Pope*, Southampton, for the official receiver.

Barlow & James, agents for *Stanton & Bassett*, Southampton, for the mortgagees.

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BEFORE
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May 16th.

IN RE GILES, EX PARTE STONE.

Bankruptcy Act, 1883, section 37.

Proof—Unliquidated damages—Misrepresentation in prospectus of company—Proof against estate of directors.

After a receiving order had been made against the debtor judgment in favour of the plaintiff was given in an action brought by reason of material misrepresentations contained in the prospectus of a company whereby such plaintiff had been induced to accept debentures, and a proof was subsequently tendered against the estate of the debtor who was one of the directors of the company for the amount claimed.

Held: That the proof in question was rightly rejected by the trustee.

The cases of *Jack v. Kipping* (L. R. 9 Q. B. D. 113) and *Ex parte Adamson, In re Collie* (L. R. 8 Ch. Div. 807) considered.

THIS was an Appeal from an order of the judge of the County Court at Kingston by which he affirmed the rejection by the official receiver as trustee in the bankruptcy of a proof tendered against the bankrupt's estate.

The appellant *Stone* is a debenture holder in a company known as the City of Genoa Waterworks Company of which the bankrupt *Giles* is a director.

The proof in question was in respect of 200*l.* which the appellant alleged he was induced to put into the company and to accept the debentures by reason of misrepresentations contained in the prospectus.

On May 16th, 1888, the receiving order was made against the bankrupt.

On August 8th, 1888, judgment was given in favour of the appellant in an action brought by him in the Chancery Division in consequence of the alleged misrepresentations, and in September, 1888, the proof for the amount claimed was tendered against the bankrupt's estate.

The proof was rejected by the official receiver as trustee and the rejection subsequently affirmed by the County Court judge.

The creditor now appealed from the rejection.

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STONE.

Poley: for Mr. Stone.

The County Court judge has refused to allow the debenture holders to prove for this amount against *Giles* who is one of the directors of the company.

[CAVE, J.—*Prima facie* there is no right to prove against a director.]

The appellant claims 200*l.* which he was induced by misrepresentations of *Giles* to put into the company of which misrepresentations he has been adjudged guilty by a judge of the Chancery Division. Section 87 of the Bankruptcy Act, 1883, provides:—“(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy:” and “(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.” My submission is that this debt arises from a promise or at any rate it arises from fraud, and when a debt has been incurred by fraud it is provable in bankruptcy. In the case of *Jack v. Kipping*. (L. R. 9 Q. B. D. 113 : 51 L. J. Q. B. 463), it was held that “A claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual credit clause (section 89) of the Bankruptcy Act, 1869, and consequently may be set off in an action brought by the trustee for the unpaid price,—such fraudulent representation not being a mere personal tort, but a breach of the obligation arising out of the contract of sale.”

[FIELD, J.—How did the deceit arise in the present case ?]

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GILES,
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The debenture holders were induced to subscribe on the representation that the share capital had been paid up. A prospectus was issued which the Chancery judge has found contained material misrepresentations and that by reason of the misrepresentations the appellant was induced to accept debentures of the company.

[FIELD, J.—That appears to be a simple tort. There was never any contract between the appellant and the bankrupt.]

It is something in the nature of fraud and for which proof ought to be allowed. In the case of *Ex parte Adamson, In re Collie* (L. R. 8 Ch. Div. 807 : 38 L. T. 917 : 26 W. R. 890), it was held by Lord Justice JAMES and Lord Justice BAGGALLAY that "Where a partnership debt has been incurred by means of a fraud on the part of the partners the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners."

Scarlett: for the official receiver as trustee was not called upon.

FIELD, J.:

Judgment. I am clearly of opinion that the decision of the County Court judge was well founded and that the appellant here has no right to prove. He cannot prove unless he comes within the legislature and in this case section 37 of the Bankruptcy Act, 1889, is clear. That section says that "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy." In order to make the debt provable therefore it must be within "contract, promise, or breach of trust." The case of *Jack v. Kipping* (L. R. 9 Q. B. D. 113) was relied upon, but in that case shares were bought by a creditor from the bankrupt. He was induced to purchase by the fraudulent representation of the bankrupt and it was held that that was a breach of the obligation arising out of the contract of sale. The obligation was to tell the truth—at any rate not to tell a material lie, and as I have said it was there held

that there was a breach of the obligation arising out of a contract of sale. If here there had been any contract with the bankrupt himself and under such circumstances there had been material misrepresentation the case would apply. Then Mr. Poley tried the case of *Ex parte Adamson, In re Collie* (L. R. 8 Ch. Div. 807). In that case Lord Justice JAMES said, "Some doubt was, however, suggested in the course of the argument whether proof could be made in bankruptcy for a fraud any more than for other torts. A great many cases—if cases were necessary—show that proofs have been allowed in bankruptcy for fraud, and on the ground of fraud only, where on a mere breach of contract they would not have been admitted. . . . But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never entertained a suit for damages occasioned by fraudulent contract or for breach of trust. The suit was always for an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated. If a man had been defrauded of any money or property and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie, or traced, the assignees or trustees were made to give it back, or if it could not be earmarked or traced, then proof was allowed against the estate." The proof was admitted on the doctrine of the Court of Chancery, for that Court although it would not entertain a suit for damages for fraudulent conduct, yet found a method for effecting its object in cases of that nature. The form of the action was not for damages but it was "Give me the thing of which you have defrauded me and if not that, give me the next best thing, viz., damages." In my opinion that principle does not apply in this case and the appeal must be dismissed.

CAVE, J.:

I am of the same opinion. The case has been argued neatly and ably by Mr. Poley and he rests it on *Jack v. Kipping* (L. R. 9 Q. B. D. 113) and *Ex parte Adamson, In re Collie* (L. R. 8 Ch. Div. 807). Now both those cases rest on the principle that if a man is guilty of a fraud and by that means gets into his own pocket the money of the person who has been defrauded, that person may

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prove for the amount which has thus come into the hands of the fraudulent party. That is the doctrine laid down in *Ex parte Adamson*, *In re Collie* (L. R. 8 Ch. Div. 807) and the principle applies to *Jack v. Kipping* (L. R. 9 Q. B. D. 113). That principle does not apply here. The benefit of the fraud has not gone into the pocket of the directors but to the company. It is unliquidated damages not arising from a contract, promise, or breach of trust and it is not fraud as explained by *Ex parte Adamson*, *In re Collie* (L. R. 8 Ch. Div. 807). It is not provable inasmuch as the judgment was obtained after the receiving order.

Appeal dismissed.

Solicitors: *E. Kimber*, for Mr. Stone.

J. C. Button & Co., for the official receiver.



PRACTICE.

IN RE SPALDING & HODGE, EX PARTE THE CHIEF OFFICIAL RECEIVER.

BEFORE
MR. JUSTICE
CAVE,
1889.
May 17th.

Bankruptcy Act, 1883, section 9 and section 10, sub-section (2).

Application for Injunction—Action against Firm in Colonial Court—Death of one of the Partners—Subsequent Bankruptcy of Firm—Interference with Rights of Plaintiff.

In 1885 an agreement was made in London by which the respondent was to act for the debtors' firm as agent in Australia, but in 1886 he was dismissed from service and commenced an action against the firm in the Australian Courts for breach of the agreement.

In 1887 the senior partner of the firm died and his son was taken into the business, but in 1889 a receiving order was made against the firm and the official receiver applied for an injunction to restrain the respondent from proceeding with his action.

Held: That as the Court was not satisfied that the rights of the respondent as plaintiff in the action would not be prejudiced or that expense would be saved the application must be refused.

THIS was an application on behalf of the chief official receiver for an order to continue an interim injunction which had been obtained *ex parte* from the registrar restraining one *S. E. Barbour* from taking further proceedings in an action brought by him against the debtors in the Supreme Court of the Colony of Victoria.

In 1885 the debtors' firm consisted of *Samuel Spalding, J. H. Spalding, Walter Spalding, and W. F. Hodge*, and on June 26th, 1885, an agreement was entered into in London between the firm and *S. E. Barbour*, by which *Barbour* was to act as the agent of the firm in Melbourne.

In August, 1886, *Barbour* was dismissed from the service of the firm and on September 26th, 1886, he commenced an action in the Australian Courts for damages for breach of agreement. A bond with sureties was entered into as security for the damages in the action.

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On June 19th, 1887, *Samuel Spalding* died, and one *S. T. Spalding* was introduced into the firm.

On March 18th, 1889, a receiving order was made against the firm and the official receiver now applied that *Barbour* might be restrained from proceeding further with the action brought by him.

Muir Mackenzie: for the official receiver.

The sections of the Act material to this case are section 9, which shows the effect of a receiving order, and section 10, sub-section (2), which provides that the Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor. Under section 87 it is clear that this claim is a liability which is a provable debt. There would be no answer to this application if the action was being brought in England. If the action is continued in Australia it will cause great expense, in addition to the delay in winding up the estate, and the whole matter can be carried out under the bankruptey. Your Lordship has power to make the order and without putting an end to the proceedings in Australia altogether, they ought at any rate to be stayed as against the debtors.

E. Cooper Willis, Q.C. (Tindal Atkinson with him): for Mr. Barbour.

Even assuming that there might be a general jurisdiction to make the order asked for where the action is brought in a Colonial Court, there is at any rate no power to restrain this action because it is not brought against the debtors alone but against the debtors and somebody else. That principle was laid down by Lord Justice JAMES and Lord Justice MELLISH in *Ex parte Isaac, In re Vecchj* (L. R. 6 Ch. App. 58 : 40 L. J. Bank. 19 : 23 L. T. 528 : 19 W. R. 38), where the headnote is "Where one partner of a firm files a petition for liquidation by arrangement under section 125 of the Bankruptcy Act, 1869, the Court has no jurisdiction to restrain an action by a creditor of the firm against all the partners." In 1885 the agreement was made between *Barbour* and certain gentlemen constituting the firm of *Spalding & Hodge*. That was

not the present firm, but three persons of the present firm and Mr. *Samuel Spalding*. The agreement was broken and an action was brought against that firm. *Samuel Spalding* is now dead, but his estate is solvent, and Mr. *Barbour* is entitled to go against his estate, when he may get paid in full. There is no power to restrain him in such a case. (Counsel also referred to *Ex parte Mills, In re Manning*, L. R. 6 Ch. App. 594: 40 L. J. Bank. 89: 24 L. T. 859 : 19 W. R. 771.)

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CAVE, J.:

I do not think that in this case I ought to make an order to Judgment continue the injunction. The case is somewhat different from those which ordinarily come before the Court, and I am not satisfied that if I stayed the proceedings as I am asked to do I should not be interfering with the rights of the creditor. I do not think I ought to make his position worse as to any remedies he may have against the deceased partner or against the sureties who have given a bond. I am not satisfied that I should not do so if I made the order, and such being the case I do not think I ought to make it. This power is not to be exercised to place a creditor under any such disability, but only where the creditor will have his rights unimpaired, and where it will save expense. I am not satisfied that it will be so here. I think I shall interfere with the rights of the present plaintiff, and I am not at all sure that I shall save expense. Under the circumstances, therefore, I have come to the conclusion that I ought not to grant the injunction.

Application refused.

Solicitors : *Ashurst, Morris, & Crispe*, for the official receiver.
Murray, Hutchins & Stirling, for Mr. Barbour.

PRACTICE.

BEFORE
MR. JUSTICE
CAVE.
1889.

IN RE PARFITT, EX PARTE THE BOARD OF TRADE.

Bankruptcy Rules 1886, Rule 112.

May 21st.

Appendix : Part II. General Regulations : No. 7 : Rule 2.

*Costs of Solicitor—Assets not exceeding £300—Costs of Conveyancing Matters—
“Proceedings under the Act.”*

Rule 112 of the Bankruptcy Rules, 1886, by which a solicitor's costs in all proceedings under the Act in which costs are payable out of the estate are reduced to three-fifths of the ordinary allowance where the assets do not exceed 300*l.*, does not apply to costs of conveyancing matters, the solicitor's remuneration in such case being regulated by the General Order under the Solicitor's Remuneration Act 1881, in accordance with Rule 2 of the General Regulations contained in the Appendix to the said Rules.

THIS was a question as to Costs of a solicitor referred to Mr. Justice CAVE from the decision of the Taxing Master.

Rule 112 of the Bankruptcy Rules 1886 provides :—“(1) The Scale of Costs set forth in the Appendix, and the Regulations contained in such scale shall, subject to these rules, apply to the taxation and allowance of costs and charges in all proceedings under the Act and these Rules. (2) Subject to the provisions of No. 1 of the scale of costs where the estimated assets of the debtor do not exceed the sum of three hundred pounds, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added ; and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed three hundred pounds, the excess shall be disallowed, and if paid shall be repaid to the trustee.”

And Rule 2 of the General Regulations contained in Part 2 of the Appendix to the Bankruptcy Rules 1886 provides that :—" In respect of business connected with sales, purchases, leases, mortgages, and other matters of conveyancing, and in respect of other business not being business transacted in Court or in Chambers, and not being otherwise contentious business, the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitor's Remuneration Act 1881 for the time being in force."

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IN RE
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In the present case the assets of the debtor did not exceed 300*l.*, but the bills of costs carried in by the solicitor who had acted for the trustee in the bankruptcy in respect of certain conveyancing business were allowed by the registrar of the Pontypridd County Court on the scale provided under the Solicitor's Remuneration Act 1881.

The Board of Trade, pursuant to Rule 124 of the Bankruptcy Rules 1886, required this taxation of the Registrar to be reviewed by the Bankruptcy Taxing Master of the High Court and they submitted four objections to the allowance: (a) that the said costs were costs of proceedings under the Bankruptcy Act 1883 and the Bankruptcy Rules 1886: (b) that the said costs were payable out of the estate: (c) that the assets of the debtor did not exceed 300*l.*: and (d) that the decision of the registrar that the reduced scale of costs prescribed by Rule 112 (2) of the Bankruptcy Rules 1886 did not apply to costs in matters regulated by Rule 2 of the General Regulations contained in Part 2 of the Appendix to the Bankruptcy Rules 1886 was erroneous.

The Taxing Master affirmed the decision of the Registrar and stated, "I am of opinion that the costs in question are not costs of 'proceedings under the Act' and being costs of conveyancing matters Rule 112 (2) does not apply, the scale in this case being regulated by General Regulation 2."

The question was, however, referred to Mr. Justice CAVE for final decision, the Board of Trade having undertaken in any event to pay the costs.

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PARFITT,
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Muir Mackenzie : for the Board of Trade.

The scale is to be reduced if the assets are under 300*l.*

[CAVE, J. : How do you make out that this is a " proceeding under the Act ? "]

Proceeding under the Act does not mean a proceeding in Court. It means any proceeding under the Act. The only power of the trustee to sell is under the Act. The trustee obtains his proper expenses out of the estate. The conveyance of the estate must be a proceeding under the Act because it is only by reason of the Act that it can be done.

[CAVE, J. : So you might say that the trustee only exists by virtue of the Act and that everything he does must be a proceeding under the Act. If the trustee had not been the trustee of a bankrupt he would have to pay the higher costs and why should a trustee in bankruptcy have the same work done for three fifths ?]

In small estates everything is to be cut down. The costs generally are subject to the reduction of three fifths. The right to obtain conveyancing costs out of the estate depends solely on the rule and the regulations. The costs are only payable out of the estate because it is a proceeding under the Act.

Cross : for the Solicitor.

The taxing master was right in drawing the distinction he did between costs in conveyancing matters and costs of proceedings under the Act. Rule 2 of the General Regulations says that " In respect of business connected with sales, purchases, leases, mortgages, and other matters of conveyancing the solicitor's remuneration shall be regulated by the General Order under the Solicitor's Remuneration Act 1881." Under the Act of 1881 the solicitor's costs were cut down to a minimum. The remuneration is only 3*l.* where the purchase does not exceed 100*l.*, and it is wished now to cut that down to 36*s.* In Rule 112 (2) the Legislature was thinking of proceedings which may be called peculiarly and distinctly bankruptcy business and for that a special scale is

provided. But when you depart from that and go to conveyancing business and proceedings outside bankruptcy the rule applies no longer.

CAVE, J.:

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I am of opinion that the Taxing Master in this case is right. Judgment. The language of the Act is not as clear as it might be as is shown by the ingenuity which Mr. Mackenzie has displayed in supporting his view, but when you come to look at the thing all round I think it is tolerably clear what was intended by these rules and regulations. The important one is Rule 112 sub-section (1) which says : "The scale of costs set forth in the Appendix, and the Regulations contained in such scale shall, subject to these Rules apply to the taxation and allowance of costs and charges in all proceedings under the Act." Now that scale of costs is to apply to taxation and expenses of costs and charges in all proceedings under the Act. Now the scale of costs which is there given is certainly limited to "proceedings under the Act" in the narrower use of that expression. It is said that the regulations contained in the scale do also apply to proceedings which are not in that narrow sense proceedings under the Act, and so undoubtedly they do. But because the Regulations apply in the case of costs in proceedings under the Act, it does not therefore follow that everything to which the regulations apply is costs in a proceeding under the Act. That is the old fallacy of an undistributed middle. The fact is that you may have a scale of costs, and you may have the regulations applying to proceedings under the Act and yet there may be regulations which apply to other proceedings or to other business, which cannot be called "proceedings under the Act,"—there is nothing at all impossible in it.

Then you come to the Second part of Rule 112 which says:—"Subject to the provisions of No. 1 of the scale of costs where the estimated assets of the Debtor do not exceed the sum of 300*l.* a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate namely three fifths of the charges." Now how do you work that out? If you come to look at it Part II. contains provisions for the Solicitor's charges, No. 1 contains certain allowances where the amount of

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assets is under 100*l.*, or does not exceed 100*l.* Then another scale where the amount exceeds 100*l.* but is under 200*l.*; and a third scale where the amount exceeds 200*l.* but does not exceed 300*l.* Therefore inasmuch as No. 1 has already provided still more minutely for solicitor's costs sub-section (2) of Rule 112 accepts the provisions of No. 1 or rather says:—"Subject to the provisions of No. 1 of the scale of costs where the estimated assets of the debtor do not exceed the sum of 300*l.* a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate namely, three fifths of the charges."

Then scales Nos. 2, 3, 4, 5 and 6 are all scales of costs and they are scales of costs in a proceeding under the Act. Now inasmuch as it is obvious that there existed an intention to make a difference in the scale of costs according to the amount of assets which were likely to be realizable, there is nothing at all extraordinary in a general rule being passed which takes the scale of costs, Nos. 2, 3, 4, 5 and 6, and cuts them down so far as a solicitor is concerned where the estimated assets are under 300*l.* to three fifths of the sum which is there charged.

Then you come to the General Regulations. Mr. Mackenzie's contention would have been stronger if the general regulations had applied solely to costs of proceedings which could not be called proceedings under the Act. But the general regulations are not limited to the costs of proceedings which cannot be called proceedings under the Act. For instance No. 3 says "All Court fees and other proper disbursements shall be allowed in addition to the remuneration in this scale provided." No. 4 "Extra allowance for length of sittings or other increased allowances not inconsistent with this scale may be allowed" and so on. No. 5 "Vouchers shall be produced on taxation, etc." No. 6 "Bills of costs shall be written lengthwise." Therefore there are a great number of regulations which undoubtedly do apply to what I have called proceedings under the Act, taking that expression as I think it must be taken in the narrower explanation of proceedings for which the scale of costs is provided in Nos. 2, 3, 4, 5 and 6.

The Rule 2 of the General Regulations provides a scale with reference to the business connected with the sale—or rather it

does not apply a scale at all with regard to that business but, it says that with regard to all that business the existing scale which has been already approved of by the Legislature is to apply. Now, where the Legislature were fixing a scale of costs for proceedings under the Act, there is nothing at all which one can fail to understand in the Legislature saying that where the assets realizable are under a certain sum then you should have only two thirds of the scale which we fix for proceedings under the Act. But when they come to costs of conveyancing business then no scale is fixed by the Legislature for the purpose of applying generally where the assets exceed 300*l.* in which case it might be said with more show of reason that it was intended the general reduction should apply when the assets were below 300*l.* But instead of doing that they refer to and adopt a scale which had already been provided by the Legislature under the Act of 1881, which scale is so drawn up as to apply to all cases generally with an express provision for reducing sums which were otherwise chargeable in cases where the amount or the value of the thing about which the business was done does not exceed 100*l.* As Mr. Cross pointed out, the Rules made under the Act of 1881 provide in Schedule 1 of the General Orders, Rule 8, that "Where the prescribed remuneration would but for this provision amount to less than 5*l.* the prescribed remuneration shall be 5*l.* except in transactions under 100*l.* in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee is to be 3*l.*" So there you find a case in which although the work done may be quite as heavy and quite as laborious, yet, when the transaction is under 5*l.* then the remuneration is to be three fifths of what it would otherwise be. Therefore you have a scale which does take into consideration the amount of the transaction and does make the amount of the charge in accordance with the amount of the transaction when it is less than 5*l.* One cannot understand why the Legislature should on the top of that say "We have cut you down to three fifths of the transaction if it is 100*l.* and now we will go and cut you down another two fifths, and reduce you consequently from 5*l.* which the ordinary charge would be to thirty-six shillings. I certainly should require something much more clear than I have

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here to satisfy me that that is what the Legislature really intended. The words which are used are "proceedings under the Act." Now that has a meaning capable of being given to it by holding that it applies to all those proceedings mentioned in the scale of costs, Nos. 2, 3, 4, 5, and 6. No. 1 I exclude because it is excluded by the rule, but with regard to all the others under these four or five scales those are strictly proceedings under the Act for which except for the scale of costs provided by the Act there would be no scale at all and consequently it is extremely natural that there should be the general reduction made applicable to cases where the amount which is to be realized is less than 300*l*; but where the Act does not apply a scale which is generally applicable but takes a scale which is provided under another Statute, and which scale itself makes provision for a reduction in the amount charged where the transaction is small, then certainly one would not expect to find the Legislature would go on to cut down the remuneration to a still smaller degree.

It is quite clear from the very language of the Rule itself that it does not apply at all to Auctioneers or Brokers or Accountants' charges, it applies only to Solicitors' charges and it seems to me that the effect of the words used in the Act is that it only applies to those charges which as I have said to my mind are charges for work done in proceedings under the Act, that is to say on the scale of charges No. 2 to No. 6 inclusive and does not apply to business done in the way of conveyancing or otherwise under Regulation 2, which I do not think can fairly and properly be said to be business or proceedings under the Act. If that is not the interpretation which the Legislature intended should be put upon their rules and regulations they have the remedy in their own hands, but it seems to me when they do use language which is capable of precise and definite meaning when you take the sense of it, that I am not justified in putting upon the words "proceedings under the Act" the larger interpretation which Mr. Mackenzie asks me to put upon these words and I can perceive no reason why the Legislature should have given them a larger meaning than that which *prima facie* they bear. For these reasons I am of opinion that the decision of the Taxing Master must be affirmed.

Muir Mackenzie :

My Lord, no question of costs arises, as the Board of Trade undertook in any event to pay the costs.

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IN RE
PARFITT,
EX PARTE
THE BOARD
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Solicitors : *The Solicitor to the Board of Trade*, for the Board of Trade.

W. R. Davies, for the solicitor.

PRACTICE.

IN RE NICHOLAS & PAINE, EX PARTE LOVETT & CO.

Solicitor's Costs—Partnership Action—Bankruptcy—Transfer to Bankruptcy Court—Charge on property recovered or preserved—Solicitors Act 1860 (23 & 24 Vict. c. 127), section 28.

BEFORE
MR. JUSTICE
CAVE.
1889.
May 17th
and 21st
and
June 1st.

Where in a partnership action in the Chancery Division a receiver has been properly appointed, but a receiving order having been subsequently made against the partners, the proceedings are transferred to the Bankruptcy Court, the Court acting on the principles of the Court of Chancery, will give a charge on the funds collected by the receiver in favour of the solicitor of the plaintiff in the action.

But if it appears that at the time of instituting the action the solicitor was well aware that the partnership was insolvent and nevertheless brings the action and obtains the order for the appointment of a receiver when proceedings might be taken in bankruptcy, for the purpose of making costs, the Court will hold that such costs were not *bond fide* incurred in preserving the assets of the partnership, and will in such case refuse to make a charging order.

THIS was an application on behalf of Messrs. Lovett & Co. who had acted as solicitors for the debtor *Paine* in an action for dissolution brought by him against his partner *Nicholas*, for a charging order for their costs on certain assets collected by the receiver appointed in such action.

The debtors *Nicholas & Paine* formerly carried on business in partnership but disputes having arisen between them an action was

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commenced in the Chancery Division by *Paine* against *Nicholas*, in which Messrs. *Lovett & Co.* acted as solicitors for the plaintiff.

A receiver was appointed in the action who got in book debts to the amount of 134*l.*, but a receiving order having been made against the debtors, the proceedings were transferred to the Bankruptcy Court and the 134*l.* was subsequently paid over by the receiver to the official receiver in bankruptcy.

Messrs. *Lovett & Co.* now applied for a charging order for their costs on the moneys so collected.

Terrell : for Messrs. *Lovett & Co.*

The receiver was appointed at the instance of the plaintiff and he has recovered assets on which the plaintiff's solicitor is entitled to a charge. The action was properly instituted. The plaintiff was served with a notice by the defendant dissolving the partnership and when he went to the office he was refused admittance and turned out of the place. He was prevented from going behind the counter and entirely excluded from the business. The only course of the plaintiff was to go to the Court in order to decide the rights of both parties. A suggestion now appears to be made that Mr. *Lovett* was told that the firm was insolvent and that it was no good to go on with the action. But Mr. *Lovett* is here and is ready to be examined. He will absolutely deny that he ever was told or knew any such thing. The bill has not been taxed but of course we only ask for the proper costs on taxation. There was no course but to bring the action and it was brought as economically as possible. Where a solicitor properly institutes an action for dissolution and properly applies for a receiver and the receiver recovers money the solicitor is entitled to a charging order for his costs. In *Jackson v. Smith* (53 L. J. Ch. 972 : 51 L. T. 72) "Where in a partnership action a receiver who was appointed at the instance of the plaintiff realised the assets and paid into Court a fund representing the proceeds of such realisation. It was held that the solicitors of the plaintiff were entitled to a lien on the fund for their costs in priority to the creditors of the partnership." (Counsel also referred to *In re Suffield & Watt, Ex parte Wiggins*, see *ante*, Vol. 5, p. 83 : L. R. 20 Q. B. D. 693 : 58 L. T. 911 : 36 W. R. 584).

Yate Lee : for the official receiver.

The official receiver's contention is that no property has been really recovered ; and further that any costs incurred have not been properly incurred which must be the case before such an order should be made. As to the first point, certain book debts were collected by the receiver. But Mr. Lovett could not point to any debt which was risky and which was saved by the receiver. The debts were collected by the receiver I admit but the debts were there and would have remained. They would have been just as well collected in the bankruptcy. It is a question of fact whether the action has preserved or recovered anything which would not have been just as well recovered by the official receiver or the trustee in the bankruptcy. If no property has been recovered or preserved the solicitor is not entitled to any charge on the principles laid down by Lord Selborne in *Pinkerton v. Easton* (L. R. 16 Eq. 490 : 42 L. J. Ch. 879 : 29 L. T. 364 : 21 W. R. 948). (Counsel also referred to *Emden v. Carte*, L. R. 19 Ch. Div. 311 : 51 L. J. Ch. 371 : 45 L. T. 328 : 30 W. R. 17.) Further these costs were not properly incurred. The action was brought after protest from the defendant that it ought not to be brought as the estate was insolvent. The defendant's solicitor told Mr. Lovett this and that it was no good going on. No solicitor is entitled to commence proceedings which he knows cannot result in any good, and if Mr. Lovett did know that the estate was insolvent when he commenced the action he is certainly not entitled to any order for his costs.

[Mr. Lovett and Mr. Gardiner, the solicitor for the defendant in the action, were both called and examined.]

June 1st.

CAVE, J.:

This was an application on the part of the solicitors for Paine Judgment. that I should give them a charge on the property which had been got in by the receiver in the action of Paine against Nicholas and I took time to consider my judgment because the case is of considerable importance in the first place as involving the right of a

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solicitor to have a charge on the assets recovered in a partnership action and secondly as involving the question how far that right extends where the partnership is insolvent at the time when the action is instituted. No doubt according to the principles of the Court of Chancery where in a partnership action a receiver has been properly appointed the Court will give a charge on the funds collected by him in favour of the solicitor of the plaintiff. That is done because where one party to a partnership so acts as to justify the other partner in asking for a receiver and the receiver gets in assets, those assets are taken to be preserved by the receiver and under ordinary circumstances a charge will be given upon them. That principle would apply where the costs are incurred properly and *bona fide*. But where the solicitor is well aware that the partnership is insolvent and takes steps and brings an action when proceedings might be taken in bankruptcy for the purpose of making costs he ought not to have his costs because they are not costs *bona fide* incurred in preserving the assets of the partnership. Now to apply those general principles to this case. I am inclined to think that Nicholas was acting *bona fide* in what he did, but undoubtedly he did resort to measures which he was not justified in doing. He excluded Paine from all dealings with the partnership business and from the assets and if the partnership was solvent the course taken by Paine's solicitor was a proper one. It is contended that at that time the solicitor knew the partnership was insolvent. On that point I have an affidavit of Paine which says that he believed there would be a surplus of 740*l.* when the action was brought. That statement was afterwards reduced to 600*l.*, but at all events he believed there would be an available balance for distribution between the partners. Against that it is said that the solicitor for the defendant told the plaintiff's solicitor that the partnership was insolvent and that as nothing would be gained by going on he ought not to proceed further. Both the solicitors have been examined before me and I have come to the conclusion that that allegation has not been made out. All that the affidavit of the defendant's solicitor says is that he was about to tell Mr. Lovett but he refused to hear, which is an unsatisfactory mode of proving that the statement was in fact made and I believe Mr. Lovett is correct in what he says that it was not made to him.

There is no evidence in the subsequent correspondence that any such statement had been made and although the fact was mentioned in a draft of one of the affidavits those parts were struck out and we are not told why they were struck out. I have come to the conclusion therefore that Mr. Lovett was not informed that the partnership estate was insolvent.

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It might be a question whether a partner who had been excluded from all management of the business would be prevented from applying for the appointment of a receiver simply on the ground that the other partner said the estate was insolvent, because in that case the assets would be left in the hands of the person who had excluded him, although undoubtedly if the statement was accompanied by an offer to take proceedings in bankruptcy to have the partnership wound up and such offer was refused by the excluded partner the latter would have to justify his conduct in going on with the partnership action under such circumstances. That question, however, does not arise here because I am not satisfied that Mr. Lovett was told the estate was insolvent. He was therefore justified in bringing the action and in obtaining the order for the receiver. The effect of the appointment of the receiver was that certain assets were got in and they have been subsequently paid over to the official receiver. It is on those assets that Mr. Lovett asks for a charge, to which I think he is entitled. Now to what extent ought the charge to go? It must have some reference to the benefit which the creditors of the partnership have derived from the steps which were taken. I will make an order that Mr. Lovett shall have a charge on the assets for the costs of the receiver properly and *bonâ fide* incurred down to notice of the act of bankruptcy. I add the words *bonâ fide* because undoubtedly if Lovett had reason to believe that bankruptcy proceedings were about to be taken and he then incurred costs which he would not have incurred ordinarily or hurried on proceedings which resulted in costs, those costs would not be *bonâ fide* incurred and he ought not to have them. But so far as the costs of the receiver generally are concerned they were *bonâ fide* incurred and I only add the words *bonâ fide* to the order because if the taxing master comes to the conclusion that any costs at the latter end were incurred unnecessarily he may disallow them. Mr. Lovett is

1889. also entitled to the costs of the action *bona fide* incurred down to
the same date. I say down to notice of the act of bankruptcy
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because as soon as he had notice of that he would know that pro-
ceedings would be taken and it would not be proper for him to go
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on incurring costs after that. I leave the taxing master to work it
out on those principles, and in case any difficulty should arise there
will be liberty to apply. I will reserve the costs of this appli-
cation.

Order accordingly.

Solicitors: *Lovett & Co.*, for the applicant.

Spyer & Son, for the official receiver.



PRACTICE.

IN RE TATUM, EX PARTE HARKER.

Bankruptcy Act, 1883, section 102, sub-section (5).

BEFORE
MR. JUSTICE
CAVE.
1889.

June 7th.

Application to rescind order of committal—Warrant issued against defaulting trustee—Subsequent payment by Guarantee Society—Right to have committal order rescinded.

Where an order was made against a trustee who had failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate, ordering him to be committed to prison in the event of his not paying the amount specified within a week, and the terms of the order not being complied with, a warrant was issued against the trustee, but the amount in question was subsequently paid by a guarantee society, and the trustee applied that the order of committal might be rescinded.

Held: That the money having been paid there was no longer any default on the part of the trustee ; and that the order for committal must be discharged.

THIS was an application on behalf of *H. Harker* to rescind an order of committal which had been made against him by Mr. Justice CAVE on April 3rd last for disobedience to an order of the Board of Trade requiring him to pay the sum of 217*l.* 9*s.* 6*d.* into the Bankruptcy Estates Account.

The case raised an important question as to the right of a trustee against whom an order of committal has been made for non-payment of moneys which have come into his hands in respect of the estate to have that order rescinded where the money is subsequently paid.

On October 23rd, 1888, an account was rendered by *Harker* of his receipts and payments as trustee in the bankruptcy from August 20th, 1886, to October 23rd, 1888.

On December 22nd, 1888, the trustee was required by the Board of Trade to pay into the Bankruptcy Estates Account the sum of 273*l.* 1*s.* 8*d.*, being the amount found due on the taking of the

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account after audit. Certain sums were disallowed from the account, the balance in the hands of the trustee being certified to be $217l. 9s. 6d.$, to which was added the sum of $55l. 12s. 2d.$ interest at the rate of 20 per cent. per annum under section 74, sub-section (6) of the Bankruptcy Act, 1883.

Mr. Harker failed to pay the said sum of $273l. 1s. 8d.$, and on April 3rd, 1889, application was made by the Board of Trade for his committal and an order was granted by Mr. Justice CAVE in respect of the principal sum of $217l. 9s. 6d.$, but such order was not to issue for a week and not to go out at all if within that time Mr. Harker should pay the said sum of $217l. 9s. 6d.$ into the Bankruptcy Estates Account and the costs of the motion: A further order was also made directing him to pay the balance of the amount certified, viz.: $55l. 12s. 2d.$ in a fortnight. (See *ante*, p. 107.)

The $217l. 9s. 6d.$ was not paid in accordance with the terms of this order and on April 17th, 1889, a warrant was issued, but on May 4th, 1889, on the application of the Board of Trade, the amount in question was paid by a Guarantee Society which was in the position of surety for the trustee.

The warrant had not been executed but was still in force and Mr. Harker now applied that the order directing his committal might be rescinded.

F. C. Willis: for Mr. Harker.

I ask your Lordship to rescind the order of committal. The money has been paid. It would have been paid before the order was ever made if the Board of Trade would only have applied to the guarantee society. They declined to do so, because the practice is to exhaust the remedies against the trustee. The guarantee society were prepared to pay the amount as soon as a demand was made and they did so as soon as it was made on May 4th. The warrant has been hanging over the head of Mr. Harker ever since April 17th. His business has been interfered with and his health is not good. Under the circumstances I ask your Lordship to rescind the order, as even assuming that the remedy of the Board of Trade is against the trustee, this man has been sufficiently punished.

Muir Mackenzie : for the Board of Trade.

I ask your Lordship not to accede to this application, because if it is acceded to it will raise a most dangerous precedent. Every trustee in bankruptcy has to give a bond like this, and if a trustee who makes default could rely that the Board of Trade would apply to the guarantee society and get paid, and upon that he would be entirely free from any risk of punishment it would introduce a dangerous laxity into the administration of the Act. There was no attempt by the debtor to comply with the order which was made. The order was that he should be committed to prison unless "he" paid. Now the guarantee society has paid. The debtor has not purged his contempt.

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[CAVE, J.: I do not see that there is any contempt. The word in the section is "default," and if somebody else has paid the money for him there is no longer default.]

There is default "by him."

[CAVE, J.: I do not sit here in such case to punish a man but to compel payment of the money and if the money has been paid I do not see what power I have. I do not punish him because he has not "personally" paid it. You have got the money, and the question is, the money having been paid and he being no longer in default, whether I can send him to prison. I think the power is given to compel payment. If your view is correct, I must send him to prison as if he had committed some crime. I could not send him to prison "until the money be paid" because the money has been paid, and I should therefore have to sentence him to some definite period of imprisonment, which I do not think it was intended I should do.]

My Lord, I cannot press the case further.

CAVE, J.:

I will discharge so much of the former order as directs a com- Judgment.

1889. mittal of the trustee. That leaves the remainder of it standing, and the trustee must pay the costs of this application.

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Order accordingly.

Solicitors : *N. Bennett*, for Mr. Harker.

The Solicitor to the Board of Trade, for the Board of Trade.



PRACTICE.

DIVISIONAL
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BEFORE
FIELD, J.,
and
CAVE, J.

June 4th.

IN RE ARKELL, EX PARTE ARKELL.

Bankruptcy Act, 1883, section 4, sub-section 1 (g).

Bankruptcy Notice—Order to pay costs to solicitor of plaintiff in Probate Action
—Bankruptcy Notice issued by plaintiff—Act of Bankruptcy.

In an action instituted in the Probate Division of the High Court for the purpose of establishing a will a decree was made in favour of the plaintiff with costs, and an order was afterwards drawn up by which it was ordered that the defendant "do within seven days pay to Arthur Cheese, Esq., of 40, Chancery Lane, the solicitor for the plaintiff, the sum of £113 being the amount of the plaintiff's costs."

A bankruptcy notice was subsequently issued by the plaintiff against the debtor upon which a receiving order was made in the County Court.

Held : That under section 4, sub-section 1 (g), of the Bankruptcy Act 1883, the plaintiff was not entitled to issue the bankruptcy notice ; and that the receiving order must be set aside.

THIS was an Appeal on behalf of the debtor *Arkell* from a receiving order which had been made against him in the Gloucester County Court.

In 1888 an action was commenced by one *Burrows* in the Probate

Division of the High Court against *Arkell* and two other defendants for the purpose of establishing a will which had been opposed by them, in which action the plaintiff was successful, the defendants being ordered to pay the costs.

On September 11th, 1888, an order was drawn up in the form commonly adopted in the Probate Division by which it was ordered that *H. Arkell, &c.* "do within seven days pay to Arthur Cheese, Esq., of 40, Chancery Lane, London, the solicitor for the plaintiff, the sum of £113 being the amount of the plaintiff's costs."

The costs not being paid a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was subsequently issued by *Burrows*, the plaintiff in the action, against the debtor requiring him to pay the debt to him in accordance with the terms of the judgment, and the debtor having failed to comply with the requirements of this notice a petition was presented in the County Court upon which a receiving order was made.

The debtor now appealed from the receiving order on the ground that no act of bankruptcy had been committed.

Yate Lee: for the debtor.

The only question is whether there has been an act of bankruptcy committed or not. The order was that the debtor should pay *Cheese*, the solicitor of the plaintiff. The question is, Can the plaintiff under those circumstances issue a bankruptcy notice? Section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, enacts that a debtor shall be held to have committed an act of bankruptcy if he fails to comply with the terms of a bankruptcy notice requiring him to pay the judgment debt "in accordance with the terms of the judgment." The judgment here is to pay *Cheese*. It might be that the plaintiff could have got the order altered directing payment to himself and if he had done so he could issue execution but not otherwise. Previous to the bankruptcy notice a *f. i. fa.* was issued by *Cheese*. (Counsel referred to *In re Winterbottom, Ex parte Winterbottom*, see *ante*, Vol. IV. p. 5 : L. R. 18 Q. B. D. 446 : 56 L. J. Q. B. 238 : 56 L. T. 168).

Ringwood (Sidney Woolf with him): for Mr. Burrows.

It is clear that these are the plaintiff's costs. The debtor in his

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deficiency account puts them down as the plaintiff's costs. The plaintiff could issue a bankruptcy notice. But in any case I ask your Lordships to amend by adding the name of *Cheese* who would be a trustee for this money. Mr. *Cheese* has no claim to the money.

[FIELD, J.—This is not a mere amendment of a process, but it is altering a man's status.]

I would refer to the case of *In re Brightmore, Ex parte May* (see *ante*, Vol. I. p. 258 : L. R. 14 Q. B. D. 37 : 51 L. T. 710 : 33 W. R. 598).

[FIELD, J.—In that case all that happened was that by inadvertence the petition was presented in the wrong Court.]

Then in *In re Hastings, Ex parte Dearle* (see *ante*, Vol. I. 281 : L. R. 14 Q. B. D. 184 : 54 L. J. Q. B. 74 : 33 W. R. 440), where a bankruptcy petition was presented by a trustee the Court allowed the cestui que trust to be joined.

[FIELD, J.—That was an amendment of a petition.]

The solicitor here in getting the costs was only acting as agent for the plaintiff.

FIELD, J. :

Judgment.

I am sorry that I feel obliged to hold that this appeal must be allowed. I say I am sorry because I think that no substantial wrong has been done since it is really admitted that the debtor owes the money. It is an inadvertence which the petitioning creditor has been led into by reason of his not being familiar with the practice. But at the same time we must not strain the law because we think that no substantial harm has been done. The real question is whether or not the receiving order can be supported. It can only be supported on the ground that the debtor has committed some act of bankruptcy. The act of bankruptcy relied on

is that specified in section 4, sub-section 1 (g) of the Bankruptcy Act, 1883. Now that section says that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment against him for any amount and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service either comply with the requirements of the notice, or satisfy the Court, that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

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Now the facts to which that section is to be applied are that the debtor was the defendant opposing the propounding of a will. A suit was instituted in the Probate Division and on May 10th, 1888, the president of the Probate Court pronounced for the will and condemned Arkell in costs. If that stood by itself that might or might not be a judgment but as we learn from the answers given by the Probate registrar to certain questions which were submitted to him in respect of this case, no execution could issue upon it. In order to render that effective it was necessary to have further proceedings. Therefore on September 11th, 1888, further proceedings were taken and that further proceeding was an order by which it was ordered that Arkell "do within seven days pay to Arthur Cheese, Esq., of 40, Chancery Lane, the solicitor for the plaintiff, the sum of 113*l.* being the amount of the plaintiff's costs." Those costs were not paid and the first step taken was a writ of *fi. fa.* by Cheese. That appears to have been ineffective and the money was not paid. Then the next step was that a bankruptcy notice was issued by Burrows, who was the plaintiff in the action, against the debtor requiring payment to him of the sum of 113*l.* being the amount of the judgment obtained by him against the debtor in the Probate Division dated September 11th. But there was no judgment available for the purposes of execution

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obtained by the plaintiff at all. The judgment obtained on September 11th was not obtained by him in form. It was a judgment obtained by Cheese because the order was to pay to Cheese. At first I thought that we might look at the real substance of the matter and say that as Cheese was only the solicitor of the petitioning creditor we might treat it as if the costs were to be paid to the clerk or agent of the petitioning creditor which was in effect payment to him, but the answers of the Probate registrar which I have before referred to preclude that. The registrar says that on production of the decree no execution could issue: on production of the order of September 11th or both that and the decree, if a *fi. fa.* issued payment would be to the person named in the order. As the matter stands it is only payment to Cheese. The plaintiff could no doubt have got the order for payment of costs made payable to him, but the question is whether the petitioning creditor is entitled to serve the debtor with this notice as the matter stands. My brother CAVE held in the case of *In re Winterbottom, Ex parte Winterbottom* (see *ante*, Vol. IV., p. 5: L. R. 18 Q. B. D. 446: 56 L. J. Q. B. 238: 56 L. T. 168), where the real creditor was the bank but the notice was given by the liquidator that it would not do. I entirely concur with that. Here the proceeding is of a serious character affecting the status of a man and it is necessary to look closely at the statute. A man who merely does not pay a debt is not a bankrupt; it must in the first place be a man who does not pay a judgment debt and even that is not sufficient for he cannot be held to have committed an act of bankruptcy until he has had an opportunity of securing or compounding for the debt or disputing his liability. The substance of the enactment is that the man should have every means of knowing who it is who asks for the money, what it is for, and whether he can pay it safely to the person who asks for it. The statute must in my opinion be formally complied with. The notice is of a highly consequential character to a man and the creditor who adopts it must give every opportunity to the debtor of knowing who it is who is seeking to enforce it and what the debt is. It may be clear that Cheese has no claim to this money but how could the debtor know that. The notice is misleading inasmuch as the claim is founded on the judgment in the name of a man

who has no right to the money the order being to pay Cheese and not to pay Burrows and the appeal must therefore be allowed.

CAVE, J.:

I am of the same opinion. The necessity for a strict compliance with the requirements of the Act has been laid down more than once. It was so laid down by Lord SELBORNE in the case of *In re Hodges* (L. R. 8 Ch. App. 204) and by Lord Justice BOWEN in *Ex parte Chinery, In re Chinery* (see *ante*, Vol. I. p. 31: L. R. 12 Q. B. D. 342: 53 L. J. Ch. 662: 50 L. T. 342: 32 W. R. 469). It is obvious, therefore, that one ought to look somewhat carefully to see whether the person seeking to take advantage of an act of bankruptcy has made out that the act of bankruptcy has been committed. Here the act of bankruptcy was the noncompliance with the requirements of a bankruptcy notice. The case was not the ordinary case of a debt terminating in a judgment. These were proceedings ending in a decree in which the defendant was condemned in costs. Then there was the order of September 11th ordering the costs to be paid to Arthur Cheese. They were not ordered to be paid to the use of the plaintiff, but to be paid to Arthur Cheese leaving it uncertain whether for his own purposes or any other. Then comes the bankruptcy notice which requires the debtor to pay W. Burrows the sum of 118*l.* claimed by him as due on a final judgment obtained by him against the debtor on September 11th. Now there appears to be more than one mistake here. The order of September 11th was not the final judgment nor did it direct that the money should be paid to or for the benefit of Burrows, but it says that it is to be paid to Arthur Cheese, the plaintiff's solicitor. The notice moreover purports to be issued by H. C. York agent for C. J. Jessop solicitor for the judgment creditor. If that notice was compared with the order of September 11th it would be seen that these persons were not connected with the former proceedings, and the order of September 11th requiring as it did payment to Cheese there might perhaps be a suspicion that Burrows was endeavouring by means of other solicitors to get money which ought to come to him through Cheese and so escape some lien which might be on it. I think it would be wrong to say that what occurred here was not a sub-

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stantial variation of the statute. It ought to be made perfectly plain to a debtor what he is to do in order to avoid bankruptcy proceedings being taken against him and it ought not to be necessary for him to go and make enquiry what he should do of any one at all. In my opinion the notice was not a sufficiently accurate compliance with the statute and forms and the receiving order must be set aside.

Appeal allowed.

Solicitors: *David Whytt*, agent for *R. Jackson*, Gloucester, for the debtor.

Digby & Liddle, for Mr. Burrows.

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PRACTICE.

COURT OF
 APPEAL.

BEFORE THE
 MASTER OF
 THE ROLLS,
 LINDLEY, L.J.,
 LOFES, L.J.

1889.

June 21st.

IN RE BRADBROOK, Ex PARTE HAWKINS.

Bankruptcy Act, 1883, section 27.

Bankruptcy Rules, 1886, Rule 66.

*Examination of witness—Discovery—Inability to attend Court through illness—
 Examination at witness's own residence.*

Where on application by the trustee an order is made under section 27 of the Bankruptcy Act, 1883, summoning a person to attend the Court to be examined respecting the debtor, his dealings or property, the Court has power in the event of the witness being prevented by illness from attending before it, to direct such examination to be conducted at the witness's own residence before an officer of the Court or some other person appointed for the purpose.

THIS was an Appeal on behalf of the trustee in the bankruptcy from an order of the Registrar by which he refused liberty to

examine a witness at his own residence before an officer of the Court.

On the application of the trustee an order had been made by the Registrar under section 27 of the Bankruptcy Act, 1883, directing one *Liebrecht* to attend the Court for the purpose of giving information respecting the debtor his dealings or property.

It was proved by medical certificate, however, that the witness was in so critical a state of health that it would be dangerous to his life if he were compelled to leave the house, but he expressed his willingness to answer all questions if the examination could take place at his own residence.

Application was therefore made by the trustee under Rule 66 of the Bankruptcy Rules, 1886, for liberty to examine Mr. *Liebrecht* at his residence before an officer of the Court or some other person appointed for the purpose.

This application was refused by the registrar and the trustee now appealed.

Herbert Reed: for the trustee.

The reason for the refusal of the registrar was that he doubted whether under the statute he had any power to allow the examination. The summons to attend the Court was given under section 27 of the Bankruptcy Act, 1883, which provides "(1.) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. (2.) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may by warrant cause him to be apprehended and brought up for examination. (3.) The Court may

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examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property."

[LOPES, L.J.: Do not the words "written interrogatories" seem to imply that the examination may be other than before the Court?]

[THE MASTER OF THE ROLLS: "Before the Court" does not mean actually standing before the Court. It means being brought before it. It would be a singular law which required a sick man to be brought into the Court.]

Rule 66 of the Bankruptcy Rules, 1883, provides that "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct." But the registrar was further influenced in his refusal to make the order here by the decision of the Divisional Court in the case of *In re Hewitt, Ex parte Hewitt* (see *ante*, Vol. II., p. 184: L. R. 15 Q. B. D. 159: 54 L. J. Q. B. 402: 53 L. T. 156) where the Court appeared to express an opinion that there was not power under this rule to compel a person to attend where no litigation was in progress. In that case however the question arose in a very different way. (Counsel also called the attention of the Court to *Warner v. Mosses*, L. R. 16 Ch. Div. 100: 43 L. T. 201.)

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case in a bankruptcy it has appeared to the Court—that is to the registrar—that a certain person can give evidence material to the enquiry and thereupon he directed the person to be summoned before the Court to give evidence. That was under section 27 of the Bankruptcy Act, 1883, and there is no doubt as to the jurisdiction to make that order. The moment the summons

was issued and served the section is fulfilled. The witness is before the Court and being before the Court it is his duty to attend the Court unless he is prevented. If he is prevented by such an illness as will endanger his life what is to be done? Rule 66 in terms then applies. The rule says that "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or any officer of the Court, or any other person and at any place, of any witness or person." There is nothing to confine that to anything less than to the ordinary signification of the words. The rule applies in terms and there is no reason why it should be cut down, but every reason why the words should be given their full signification. Where a person is prevented by such an illness as will endanger his life from attending the Court it is necessary for the purposes of justice that he should be examined elsewhere and then under Rule 66 the Court may make an order. The case of *In re Hewitt, Ex parte Hewitt* (see *ante*, Vol. II. p. 184) does not in my opinion apply and what was said in *Warner v. Mosses* (L. R. 16 Ch. Div. 100) if applied to a case like this is directly in point.

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LINDLEY, L.J.:

I am of the same opinion. The case is of some practical importance that there should be some method of taking the evidence of a witness if he is well enough to give it although not well enough to come to Court. Rule 66 exactly fits the case and I cannot understand that *In re Hewitt, Ex parte Hewitt* (see *ante*, Vol. II. p. 184) touches this case. There the Court held that the power to summon which is given by section 27 did not apply where the estate of a person dying insolvent was administered in bankruptcy.

LOPES, L.J.:

I entirely agree. I feel no doubt that the effect of section 27 combined with Rule 66 would have fully justified the registrar in directing the examination of this witness at his residence before some person appointed by him. I also think that the case of *In*

1889. *re Hewitt, Ex parte Hewitt* (see *ante*, Vol. II. p. 184) has nothing
 to do with this case.

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Solicitor : *R. Raphael*, for the trustee.

Cases referred to :—

In re Hewitt, Ex parte Hewitt, see *ante*, Vol. II. p. 184 :

L. R. 15 Q. B. D. 159 : 54 L. J. Q. B. 402 : 53 L. T.
156.

Warner v. Mosses, L. R. 16 Ch. Div. 100 : 43 L. T. 201.



IN RE JONES, EX PARTE THE TOWER FURNISHING COMPANY.

DIVISIONAL COURT.
BEFORE FIELD, J., AND CAVE, J. 1889.
May 14th and 15th.

Bill of Sale—Sale by sheriff of proceeds of execution—Hiring agreement by purchaser to debtor's wife—Receipt and inventory—Registration—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), section 4—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), section 8.

Certain goods of the debtor having been seized by the sheriff under a writ of execution, an order was made by consent giving the sheriff power to sell such goods by private contract to the appellant Company.

The goods were accordingly sold to the Company for the amount of the execution debt, the money being paid to the sheriff's officer and a receipt for the money together with an inventory of the goods sent by post.

On the same day the Company let the goods to the wife of the debtor under a hiring agreement.

The receipt and inventory were not registered, and on the subsequent bankruptcy of the debtor the goods in question were claimed by his trustee :

Held: That the transaction was one of purchase and sale and that the title was complete before the receipt and inventory was signed or came into existence; that there was therefore no document which required registration under the Bills of Sale Act; and that the trustee was not entitled to the goods.

A receipt which requires to be registered as a bill of sale under the Bills of Sale Acts, is one which is intended to be the instrument of transfer or a record of the transaction, and where there is no evidence of any intention of that kind a receipt signed by the seller of goods need not be registered.

THIS was an Appeal on behalf of the Tower Furnishing Company from an order of the Judge of the County Court at Kingston, by which he set aside certain transactions which had taken place between the said Company and the bankrupt.

The bankrupt *Jones* carried on business at Staines and Hounslow, and on June 12th, 1888, execution was put into his premises at Staines for a debt of about 49*l.* 17*s.*, due to one *Thomasson*.

On June 17th, 1888, the debtor came to London and saw a Mr. *Panchaud*, the Manager of the Tower Furnishing Company, with whom it was agreed that the Company should purchase from the sheriff the goods seized, and should relet them under a hire and purchase agreement to the debtor's wife. The debtor then

1889. executed in favour of the Company a memorandum of deposit
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Co. whereby he created an equitable mortgage of the premises upon which he carried on his business and also of some houses which he had let to under-tenants, in order to secure the repayment of the instalments due from time to time under the agreement.

On June 18th, 1888, an order was made by a Master in Chambers with the consent of the debtor that the sheriff be at liberty to sell the goods seized by private contract; and on the same day Mr. *Panchaud*, who was accompanied by the debtor, went to the office of the sheriff's officer and gave to him a cheque of the Company for 49*l.* 17*s.*, upon which the sheriff's officer forthwith wrote an authority to the man in possession at Staines to go out of possession.

No receipt or inventory was then given, but a promise was made by the sheriff's officer that they should be sent by post. The receipt was sent to the Company the same night, and was in the following form:—

Received this 18th day of June, of the Tower Furnishing Company the sum of 49*l.* 17*s.* 0*d.*, being for the goods, chattels, and effects seized at Staines under the above execution, sold, with the defendant's consent, without warranty of title, by order of Master Manley Smith, bearing date the 18th day of June, 1888.

It was accompanied by a letter from the sheriff's officer, and reached Mr. *Panchaud*, the Manager of the Company, on the morning of June 19th. The letter was as follows:—

We beg to hand you herewith the formal receipt which you require in the above. The copy order we think you had with you to-day. The inventory shall follow to-morrow (Tuesday), as we find Mr. Jessop, our auctioneer, has not yet completed it.

On June 19th the wife of the bankrupt signed an agreement for the hire of the goods to her by the Company.

A receiving order was subsequently made against the debtor *Jones*, upon which he was adjudicated bankrupt, and the goods in question were claimed by the trustee on the ground that the transaction which had been entered into was really a loan by the Company to the bankrupt, and that the receipt, &c., was an assurance which required to be registered under the Bills of Sale Acts.

The County Court Judge allowed the claim of the trustee, and set the transaction aside, and from that decision the Tower Furnishing Company now appealed.

Sir Horace Davey, Q.C. (Scott with him) : for the Tower Furnishing Company.

The transaction was a perfectly genuine one. It was a *bona fide* sale by the sheriff to the Company followed by a letting of the goods to the bankrupt's wife.

R. V. Williams, Q.C. (Scarlett with him) : for the trustee.

The transaction was really a loan by the Company to the bankrupt. The receipt, &c., are assurances within the Bills of Sale Acts, and must be registered. If a receipt is given in the ordinary course of business no registration is required, but if it misrepresents the transaction, as it does here, then it must be registered. In the case of *French v. Bombernard, The Tower Furnishing and Finance Company Limited (Claimants)* (60 L. T. 48), "The household furniture of the defendant in the action was distrained by his landlord on two occasions for rent due, and was sold by the landlord's broker to the claimants, who on each occasion immediately after the sale let it to the defendant's wife under a hiring agreement. On completion of each sale the broker gave the claimants an inventory of the goods and a receipt for the purchase-money. These documents were not registered under the Bills of Sale Act, 1878. The defendant remained in possession of the goods, which were afterwards seized by the sheriff under a writ of *fi. fa.* issued by the plaintiff in the present action. It was held that the documents together constituted a bill of sale within section 4 of the Bills of Sale Act, 1878, and required registration, and as they had not been registered the plaintiff was entitled to the goods." (Counsel also referred to *Woodgate v. Godfrey*, L. R. 5 Ex. Div. 24 : 48 L. J. Q. B. 271 : 42 L. T. 34 : 28 W. R. 88 : *Marsden v. Meadows*, L. R. 7 Q. B. D. 80 : 50 L. J. Q. B. 536 : 45 L. T. 301 : 29 W. R. 816 : *Cochrane v. Matthews*, L. R. 10 Ch. Div. 80, n. : 39 L. T. 384 : *Ex parte Odell, In re Walden*, L. R. 10 Ch. Div. 76 : 48 L. J. Bank. 1 : 39 L. T. 383 : 27 W. R. 274 : *North Central Wagon Company v. Manchester, Sheffield & Lin-*

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Judgment.

FIELD, J., after stating the facts, said :—

The question is whether or not the property in the goods passed to the Tower Furnishing Company. Unlike land, property in goods passes by delivery, if that delivery is according to the intention of the parties to pass the property. Accordingly, therefore, we find that on June 18th, after the cheque had been given by the Tower Furnishing Company to the sheriff's officer, with which he was quite satisfied, and after he gave the authority to his man to go out of possession, there was a complete delivery of these chattels to the claimants, the Tower Furnishing Company. Mere delivery, of course, would not be enough. But was that a delivery with an intention of passing the property? According to those facts, and there is no contradiction at all, it would seem beyond all question that that was so. After that, on the morning of June 19th, the inventory and the receipt were furnished in due pursuance of a promise made the day before. The next step in the matter was this. No doubt the bargain was that the Company were not only to pay out the sheriff and to take the property and do what they liked with it, which in the case of an ordinary purchaser would have been the case, but they were in pursuance, I infer, of their mode of business, at liberty to let out this furniture upon a hiring agreement. Accordingly, on June 20th, they executed a hiring agreement to the wife of the bankrupt upon terms that have been adverted to and which was practically in the same form as in the case of *French v. Bombernard* (60 L. T. 48), which was before me. Under those circumstances either Jones or his wife, it does not matter for this purpose who it was, resumed possession of the goods, carried on the business, sold a very small portion of them, which is not a matter important to the main issue, but upon the question of order and disposition which I may as well dispose of now. The goods sold consisted of furniture and stock-in-trade, and of course the hiring agreement assumed that the stock-in-trade and furniture by itself would be kept intact for the purpose of being held as security. Of course the stock-in-trade would have been useless if the arrangement had been carried out, and therefore the

bankrupt or the wife, or both, but substantially the bankrupt, applied to the Tower Furnishing Company to allow the stock-in-trade to be the subject of sale in his ordinary course of business. Thereupon, what is called a memorandum of delivery and agreement was come to, by which the goods are distinctly stated to have been in the possession of Jones and his wife upon terms of sale or return, and accounting for the proceeds. That contract, as has been held over and over again, does not pass the absolute property in the goods to the tradesman. It passes a qualified property more in the nature of a power of sale at a given price, the tradesman taking the surplus over that price, if there be any, accounting to the general owner (in this case the Tower Furnishing Company) for the goods, or the prices set opposite to the goods in the memorandum of return and sale. In that state of things some time afterwards a receiving order was made against Jones, the husband, and thereupon the trustee, Harris, seized these goods. The County Court Judge decided that the transaction with the Company was void, or voidable, and set it aside, which is the order complained of before us.

It is impossible in the state of the evidence to form any judgment of importance as bearing on the questions which we have to decide, as to what the real value of the goods was. I think it clear that no attempt was made to ascertain by valuation in any shape or way what it was, but that the parties were content to take the goods at the value of the amount in execution.

[*His Lordship went through the evidence at great length and continued:*]—Therefore, upon those facts we are called upon to say whether or not the transaction is void by reason of the non-registration of the receipt or any of the other documents. Now that depends upon the construction to be put upon the Bills of Sale Act, 1878, section 4, and the judicial decisions upon it. In the Act of 1854 the words “receipt and inventory” did not occur, though practically all the other words now in section 4 were there, and the enactment was intelligible because it stated a series of things each of which was an assurance. Upon that state of the law various cases occurred. There was the case of *Ex parte Odell, In re Walden* (L. R. 10 Ch. Div. 76), and *Cochrane v. Matthews* (L. R. 10 Ch. Div. 80), and I think also one other case, the name of which

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1889. I do not recollect, holding that under the circumstances of the case receipts and inventories were not assurances within the meaning of the Act of 1854. But that being the state of the law on one side of the Court, then came the decision of *Woodgate v. Godfrey* (L. R. 5 Ex. Div. 24), which was a decision of the Common Law Division of the Court, and although the law has been altered in terms, the principle laid down in the case is equally applicable to the new legislation as it was to the old. That case was before the statute of 1878. Then came that statute of 1878, and I think there can be no doubt that the Legislature, being aware of these cases, intended to preclude any further discussion of that kind, and thought they had done so by putting the words into the statute "Inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods." But those words are interposed between words which describe assurances, and the words "and other assurances of personal chattels." Therefore it became necessary to construe that judicially, and to say what the meaning of that was. Everybody agrees it was not intended by the Legislature, whatever the language might be, to include a receipt on the ordinary purchase of goods. Therefore, the Courts very soon held that it was not enough merely that it should be a receipt with inventory attached or a receipt for purchase-money, but it must also come within the words "other assurance." That was settled finally, I think, by the case of *Marsden v. Meadows* (L. R. 7 Q. B. D. 80), which occurred shortly afterwards, and which has never been overruled or questioned. I shall not go through the judgment, but I will read one passage from the judgment of Lord BRAMWELL, in which he says this: "I think that the proper interpretation of this enactment is that when the receipt is intended to be the instrument of transfer, or a record of the transaction, then it is to be registered and attested as a bill of sale under the Act; but that where there is no evidence of any intention of that kind, it shall be unnecessary to register a receipt signed by the seller of the goods." That is a short principle which I think is applicable to the present case, and in the case of the *North Central Wagon Company v. Manchester, Sheffield and Lincolnshire Railway Company* (L. R. 85 Ch. Div. 191), Lord Justice COTTON, when it was before the Court of Appeal, cites that passage from the judgment of Lord BRAMWELL with

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approval as containing the principle upon which the matter may well be founded. Another thing has always been relied upon, also, namely, whether it was all one transaction. But that comes of course to the same thing, because if the title is constituted independently of these documents that require registration, then according to this decision, and according to this principle, the document does not require registration. But if the bargain involves a series of transactions, and the title is not complete without that, then you may look to all the transactions being in fact one, there being only one transaction evidenced by a series of documents which under those circumstances would require registration. Assurance, then, means a document of title showing that it is relied upon by way of assurance, otherwise it does not come within the Act. Besides these cases there was a case before me and my brother WILLS of *French v. Bombernard* (60 L. T. 48), which has been cited. As far as I am myself concerned, I may say that I decided the law in that case upon the facts of it, and the facts there were very different to those in the present case. In that case very remarkable things occurred. There was first of all a seizure of a certain portion of the goods in a well-furnished house, and there was no attempt to value those goods in any shape or way, except a very ineffectual appraisement, which was not an appraisement at all really, and as to which there was evidence, which rather weighed with me, that the goods which were seized and inventoried were of very much more value than the amount of the rent. But what occurred afterwards was to my mind almost conclusive. That occurred in the Christmas quarter or half-year, but in the Midsummer quarter a very identical transaction occurred, and the remarkable thing was this. Rent was allowed to go in arrear, and did go in arrear. Thereupon the landlord's broker, who was only supposed to be interested for the landlord, instead of seizing all the goods in the house which a landlord's broker would only do, or perhaps some indefinite portion of them—carefully selected for seizure only those goods which were not covered by the prior bill of sale. To my mind that was conclusive that it was not a real *bona fide* seizure or sale by the broker, but that it was a very ingenious attempt to protect the goods really and truly from the execution creditor. I have the greatest aversion to reading my

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own judgments, and therefore I have never read that judgment since, but my memory of it is that I then went through all the cases, and so far from intending in any way to overrule or alter them, I intended to act loyally upon them. Therefore, even if my judgment were wrong upon the facts of the case, it does not affect this case. I may have been right or wrong, but I never in any way intended to alter the principle of those decisions. Therefore, under those circumstances, I have come to the conclusion, and I do not see how we can escape from it, that in this case the proposition laid down by Lord BRAMWELL is fulfilled in one part, viz., that the transaction as it appears on the documents and evidence is a transaction of purchase. It is an invariable rule of construction, or inference of fact, to support documents and contracts according to their intention, unless you can be satisfied that it is a mere sham, and that there is something behind which the parties have concealed or have endeavoured to give effect to. Nobody likes it to be known that he is no longer the owner of goods, and so far as I can judge, the intention of both parties here was that this should not be a document which required registration. Still, notwithstanding that they had that intention, if they have made it an assurance it must be registered. But I think it is of weight in considering whether they have done so or not, to bear in mind that the evidence here is all one way upon that point, and I am unable to see any sufficient ground upon which I ought not to give effect to the documents as they are, and to the affidavits of the parties as they are sworn. If there is ground for saying that the evidence of Mr. Panchaud and Mr. Jones is unfounded and false, that should have been made good by cross-examination of them, or by affidavits of facts tending to show that, but nothing of the kind has been done.

Under those circumstances, therefore, I think the appeal must be allowed upon the ground that the title here was complete before the receipt and inventory was signed or came into existence.

CAVE, J.:

I am of the same opinion. The learned County Court Judge is said to have founded his decision upon the view that the whole transaction was a sham. Now, unfortunately, we have not the

judgment of the learned County Court Judge before us, and I feel some hesitation in accepting that view of his judgment, because it is manifest here that there was an execution creditor, a seizure by the sheriff, a sale by the sheriff, and a payment to the sheriff of the sum of 49*l.* odd, which is quite sufficient to show that the transaction is not a sham throughout. I should doubt very much whether that really was what the learned County Court Judge meant. I should rather be inclined to think that what he meant was that the transaction was a loan, and not a sale by the sheriff, and that that was the ground of his decision. Now, I have no doubt at all that the execution debtor was told by the sheriff's officer, "If you go to the Company they will help you. You cannot pay me out, but if you go to them they will find the money and enable you to get rid of me." And upon that the debtor did go to the Company and asked them to help him, and they agreed to do so. I have no doubt at all that the debtor contemplated the ultimate result of what took place would be that he would pay off the debt at the end of the three years, and at that time would be in the same position as if there had been a sale to him for 49*l.* odd, upon the terms of its being paid within the three years. I have no doubt also that what the Company intended to do was that they should get back their money, either by payment from the debtor or by sale of the goods, and they looked to that as being the ultimate end of the transaction also. But it seems to me it is a mistake to say that because an ultimate end may be reached in two ways, that therefore it is to be taken to be reached in either one of those particular ways, no matter how it was got. Suppose a man has got a mortgage upon his freehold estate for 1,000*l.* which is called in. He goes to a friend and says, "Will you lend me the money to pay this mortgage off? You can have the security of my estate;" and the friend says, "Certainly I will." There are two ways in which that transaction may be effected. One is by paying the 1,000*l.* to the first mortgagee and taking a transfer from him. The second way is by paying the 1,000*l.* to the mortgagor, letting him pay off the first mortgage and taking a fresh mortgage from him. There would be brought about the same result in the end with this difference, that in the one case the second lender would be freed from all titles that may have been created, or attempted to be created, by the mortgagor

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between the first mortgage and the second mortgage, while in the second place of the fresh mortgage from the mortgagor and not the transfer from the mortgagee, he might run the risk of finding that the mortgagee had, in the interval, created some right which might interfere with his security, and therefore undoubtedly he would adopt the first of those two methods, that is, taking a transfer from the first mortgagee. But because precisely the same result would be produced so far as those parties are concerned, by paying off the first mortgage and taking a fresh mortgage, no one would dream of arguing that because that could have been done, therefore it must have been taken that the second mortgagee and the mortgagor did do that very thing which they elected not to do, for that very reason. So here it is perfectly clear that at the time when the debtor went to the Company the debtor had not got the power of giving a good title to the Company, because the execution creditor had seized. Of course it is quite obvious there are two ways in which this transaction might have been effected, that is to say, the result which both parties contemplated as the result which was to come about in the end. The Company might have lent the money to the debtor, and they might have said, "Go and pay out the execution creditor, and then you will have a perfectly clear title, which you will transfer to us." But then, if they had done that, in all probability the result would have been a transaction evidenced by some document which they would have been compelled to register, and that they were anxious of avoiding, so they said, and they said, as it seems to me quite in accordance with the law, "We will not take the matter in that fashion, we will have a transfer from the sheriff. He can convey a perfectly good title to us, and when we have got that title from the sheriff we will then execute a purchase and hire agreement, the result of which will be that if you fulfil the terms of the purchase and hire agreement, you will, at the expiration of three years and after you have paid us, find yourself in possession of these goods." Now what is there illegal in that? It appears to me that that is a perfect legal mode of carrying out a transaction, the result of which the parties contemplated. It is quite true it might have been carried out the other way by means of a loan, but they are not bound to carry it out by means of a loan. They are entitled to carry it out in the way in which they actually

did carry it out. No doubt, so far as the result contemplated was intended, the same result might have been brought about by a loan, but the same result would be equally brought about by a purchase from the sheriff and by a purchase and hire agreement subsequently, and inasmuch as there was no objection to that form of bringing that result about, that is the form the parties thought fit to adopt, and there was no reason why they should not, it seems to me, have adopted it. That being so, and there being undoubtedly a purchase from the sheriff, what was there wrong in that? It is said that that was a sham, because there was no enquiry made by the sheriff as to the actual value of these goods, and he sold them at a value less than their full value. But the sheriff's duty was to realize by the sale an amount sufficient to pay the execution creditor, and he had no further right to meddle with the goods than for the purpose of doing that. That being so, the execution debtor comes and says, "I have agreed to sell these goods to so and so for so much, and that sum of money will enable you to pay the execution creditor and to pay also all the fees and costs of the execution, therefore I desire you to take that." The sheriff's officer took it, and it seems to me he was bound to take it, and that if he had said, "This is not a fair price for the goods and I will insist on selling these goods by auction, and will not agree to sell them by private contract to the person you tell me is ready to buy them," he would have gone beyond his duty and in all probability would have exposed himself, and possibly the sheriff, to an action. Now that being so, what is there further? The consent of the debtor is obtained by a promise, on the part of the Company, that if he will consent to this purchase by them, they will afterwards lend the things to him upon a purchase and hire agreement. What is there illegal in that? There is no suggestion that the man is at all overreaching in any way, but he knew perfectly well what he was doing. He knew perfectly well that he would have to make these payments, and that if he did not make these payments the Company could proceed upon the purchase and hire agreement to exhaust the remedy given them by that document. I can see nothing at all which would entitle us to say that that is not a perfectly valid agreement and an agreement which they may, without contravening any law whatever, arrive at.

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Then having got so far, and having come to the conclusion that the substantial transaction was not a loan, but was a purchase from the sheriff upon an agreement entered into with the debtor that there should be a purchase and hire agreement subsequently, let us see then what we get to. Was it necessary under those circumstances that the receipt or inventory, or either of them, should be registered under the Bills of Sale Act? Now I quite agree that it is extremely desirable that there should be some plain and simple rule laid down upon this subject, so that a lender who is minded to take the security of personal chattels should know, beyond all doubt, whether he has or has not to register his security, and I cannot help thinking an enormous amount of mischief has been done by the difficult questions thrown in the way of borrowing upon the security of personal chattels by the Act that was passed in the year 1882. For some little time after that Act came into operation, from time to time in these Courts there were cases in which bills of sale were brought before the Court in which the lenders had been content to lend their money at 5 per cent.—honest *bona fide* transactions. In almost all those cases those bills of sale were set aside for want of some compliance with the terms of the Act. The natural result followed, that of late years one has never seen a bill of sale with anything approaching 5 per cent. interest. One has never seen a bill of sale in which the lender was anything but a money lender who made it his business—who could afford to make himself aware of the pit-falls and avoid them by means of putting on an extra percentage for interest to repay himself for those cases in which the pit-falls proved too many for him. For my part I am quite satisfied from the experience I have had in these Courts, that the average rate of interest on a bill of sale has been considerably increased as the result of the legislation of 1882. That being so, and it being desirable that there should be a rule which a plain man can apply, we have, as it seems to me, such a rule laid down in the case of *Marsden v. Meadows* (L. R. 7 Q. B. D. 80). There, as here, there was a sale by the sheriff to the person who claimed the goods. It is said that there is a distinction between the two cases, because it does not appear there that there was an agreement by the execution debtor that the goods should be sold for any other than their full value. But how can

that affect the question of whether the receipt or inventory that is given has to be registered or has not to be registered? The title is obtained from the sheriff, and from him alone, and whether there is or not a consent as to the amount of the price which is fixed and agreed upon between the purchaser and the sheriff, whether there is an assent to that by the execution debtor or not, cannot affect the question of whether the receipt or inventory given by the sheriff are or are not to be registered. So, again, suppose there is not a full consent by the execution debtor to the price which the sheriff is to demand and the purchaser is to pay, but that consent is brought about by a promise on the part of the purchaser that he will do something with the goods which may benefit the execution debtor. How, again, can that affect the question of whether or not the receipt or inventory, or either of them, are to be registered as a bill of sale? We are dealing solely with the question of whether they do or do not, were or were not, intended to serve as a record, not of the transaction between the purchaser and the execution debtor, but of the transaction between the purchaser and the sheriff's officer, and it seems to me that any arrangement between the purchaser and the execution debtor, which forms no part of the sale between the sheriff's officer and the purchaser, which is not even referred to either in the receipt or inventory, cannot make it necessary to register either that receipt or that inventory. I therefore come to the conclusion that this case is governed by *Marsden v. Meadows* (L. R. 7 Q. B. D. 80), and consequently that there was no document which required registration.

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CO.*Appeal allowed.*

Solicitors: *Vanderpump & Son*, for the Tower Furnishing Co.
F. G. Mellows, for the trustee.

PRACTICE.

DIVISIONAL
COURT.

BEFORE
FIELD, J.,
AND
CAVE, J.
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May 15th.

IN RE FAULCONER, Ex parte COCHRANE.

Bankruptcy Rules, 1886, Rule 130.

Notice of Appeal—Preliminary objection—Appeal out of time—Notice sent by post—Extension of time.

An appeal is brought by serving the notice on the respondent which must be done within twenty-one days.

Where notice of appeal was posted on the last day allowed, but such notice did not reach the respondent until after the expiration of the twenty-one days, and a preliminary objection was taken that the appeal was out of time.

Held: That the objection must be allowed; and that the Court would not give leave to extend the time, the practice being settled and no valid reason having been put forward why indulgence should be shown.

Compare *In re Arden, Ex parte Arden*, ante, Vol. II., p. 1.

In re Mundy, Ex parte Stead, ante, Vol. II., p. 227.

In re Tippett, Ex parte Tippett, ante, Vol. II., p. 229.

THIS was an Appeal from a decision of the County Court Judge at Hastings, by which he declared that the appellant, A. S. Cochrane, had no title to certain fixtures which were separately conveyed in a mortgage by demise.

Kisch: for the appellant Cochrane.

Herbert Reed: for the trustee.

Herbert Reed:

I have a preliminary objection. The appeal is out of time. The order was made on December 17th, 1888. It was perfected on January 11th, 1889, and from that day the time runs. The last day would therefore be February 1st, 1889. At 5:30 o'clock on February 1st, the appellant posted to the respondent in Hastings a notice of appeal. That could not reach the respondent within the twenty-one days and did not in fact reach him until the second

post on February 2nd. Service of the appeal is bringing the appeal, and therefore it was out of time.

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Kisch :

In the case of *In re Arden, Ex parte Arden*, (see *ante*, Vol. II., p. 1 : L. R. 14 Q. B. D. 121 : 51 L. T. 712 : 33 W. R. 460), great doubt appears to have been felt by this Court whether where notice of appeal was sent by post, such notice was, or was not in time, unless the letter was received by the respondent before the expiration of the twenty-one days during which the appeal could be brought.

[CAVE, J.:—Even assuming what you say is correct that the Court then said there might be a doubt, it is a very different thing what the Court does just after a new Act is passed, and what it will do when everything is in full working order.]

The Court in that case extended the time and so got over the difficulty. There was full power to do so, and I ask your Lordships to grant me an extension now. The appellant's solicitor was under the impression that if the notice was posted within the twenty-one days it would be sufficient.

CAVE, J. :

I am of opinion that we ought not to give leave to extend the Judgment time in this case. It is quite clear that the time was expired. As far back as the year 1884, by the case of *In re Courtenay, Ex parte Dear* (see *ante*, Vol. I, p. 89), it was decided that the appeal is brought by serving the notice on the respondent, and that that must be within twenty-one days. Now we are asked as an indulgence to extend the time. No doubt in a proper case it can be done, but some reason must be given why it should be done. People must make themselves acquainted with the law, and when there is a decision on the point as there is in this case, ignorance is inexcusable. Further than this, there seems no reason why Cochrane should have waited until the last moment. The County Court Judge said that it appeared to be a case proper for appeal, and there was abundant time to serve notice of appeal. The

1889. appellant was not out of England, or anything of that kind, but
IN RE for some reason or other of the solicitor the matter was put off. If
FAULCONER, time is so overstepped people must take the consequences. The
EX PARTE appeal must be dismissed with costs.
COCHRANE.

FIELD, J.:

I wished my brother CAVE to give judgment first, but I entirely agree.

Appeal dismissed with costs.

Solicitors: *Cooper*, for the appellant.

S. F. Langham, for the trustee.

IN RE BOYD, EX PARTE BOYD.

DIVISIONAL COURT.

BEFORE
FIELD, J.,
AND
CAVE, J.
1889.May 16th.*Bankruptcy Act, 1883, section 48.**Fraudulent preference—Transfer of shares by debtor—Fraud against Bankruptcy Laws.*

The debtor shortly before his bankruptcy transferred to his father certain shares of the value of 2,000*l.* in a company of which his father was the promoter and principal shareholder, the father at the same time paying off a charge of 105*l.* which had been effected on the shares by the debtor and also certain sums of money amounting to about 1,000*l.* received by the debtor on behalf of the said company and not accounted for.

The shares in question constituted practically the whole of the assets of the debtor and the transaction was subsequently set aside by the County Court judge as being void against the trustee.

Held: That there being no evidence of any criminal proceedings having been contemplated against the debtor in respect of his alleged defalcations, and the father being well aware of the debtor's insolvent condition at the time when the transfer was made to him, the County Court judge was right in setting the transaction aside.

THIS was an Appeal from an order of the judge of the County Court at Yeovil, by which he declared that the sale of certain shares by the bankrupt, *James Stewart Boyd*, to his father, *John Boyd*, was fraudulent and void as against the trustee in the bankruptcy.

The bankrupt, *J. S. Boyd*, formerly acted as a traveller on salary and commission in the employ of John Boyd & Co., Limited, of which company his father was the promoter and principal shareholder. The bankrupt himself also held shares in the same company of the value of 2,000*l.*

In November, 1887, the bankrupt being then insolvent and having no property except the shares in question, had received various sums of money amounting to upwards of 1,000*l.* belonging to John Boyd & Co., Limited, his employers, for which he had not accounted.

Several interviews thereupon took place between the secretary of the company and the bankrupt and his father, which eventuated, on November 8th, 1887, in the bankrupt's father paying off a charge of 105*l.* which had been effected on the shares by the bank-

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rupt, and taking a transfer of all the shares held by the bankrupt in the company. It was also alleged that at the same time he paid off the amount of the bankrupt's defalcations.

J. S. Boyd shortly afterwards became bankrupt, and application was subsequently made by the trustee to the County Court for an order declaring the alleged sale to be void, and that *John Boyd* might be directed to execute a transfer of the said shares to the trustee.

The County Court judge in his judgment stated that at the time of the transaction there was no evidence of any criminal proceedings having been commenced or threatened or even seriously contemplated, nor did the debtor appear to be under any real apprehension on the subject: at the time, however, *John Boyd* appeared to have been fully aware of the position of his son's affairs: it was shewn that all the sales of shares in the company which had taken place since its formation, were, with the exception of the transfer in question, made by *John Boyd* to other persons at prices not less than the par value: the matter therefore stood thus, that by this transaction *John Boyd* obtained from his son, the bankrupt, within three months of his adjudication, shares of the value—as fixed by himself—of 2,000*l.* for the price of 1,100*l.* or thereabouts, very little more than half: viewed in this light it would seem impossible to support the transaction, but apart from this, by the transfer in question *John Boyd*, by what was in reality a voluntary arrangement on the part of the bankrupt, obtained the most valuable asset and virtually the whole of the estate for his own benefit or for the benefit of the company of which he was the virtual proprietor.

An order was accordingly made by the County Court judge by which *John Boyd* was directed to execute a transfer of the said shares to the trustee in bankruptcy on payment to him of the sum of 105*l.*, which had been advanced to release the charge upon the shares with interest at 4 per cent.

From that order *John Boyd* now appealed.

E. Cooper Willis, Q.C. (Yate Lee with him): for *John Boyd*.

It was said that this transfer made to the father was void under the Statute of Elizabeth and an act of bankruptcy and fraudulent under the policy of the Bankruptcy Laws, as tending to defeat or

delay creditors. The County Court judge treated it as coming under the latter head, and he ordered Mr. *Boyd* to execute a transfer of the shares to the trustee. But the County Court judge did not appreciate the evidence. He has thought that fraud suggested is fraud proved. No fraud is proved here. The object of the payment was to prevent any risk of a prosecution.

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[FIELD, J.: I cannot put my hand on any part of the evidence which shews that criminal proceedings were thought of.]

Then when the case was before the County Court, Mr. *Boyd* asked for an adjournment to enable him to call the evidence of expert witnesses to prove the actual value of the shares. But the judge declined to grant an adjournment, and he ought to have allowed it.

Bigham, Q.C. (F. C. Willis with him): for the trustee, were not called upon.

FIELD, J.:

If this case were in another branch of the law, and not "In Judgment Bankruptcy," what I should say would be "I do not think we can disturb the verdict." It seems to me that it was a question of fact before the County Court judge, and he saw the witnesses. The evidence has been read to us to-day, and upon that evidence it is impossible for us to say that the County Court judge was wrong. The father of the bankrupt was the managing director of this company. He practically was the company, and carried on a successful business averaging a good rate of interest. Under those circumstances the son is a ne'er-do-well—he has been employed by the company, and does not account to his principals for moneys received. Whether that non-accounting would support a prosecution for embezzlement I do not know, but at any rate, he received money which he was unable to pay. He had nothing but these shares, and under those circumstances, in November, the only property of the son is parted with to the father for something like 1,100*l*. So far as the evidence goes, it is conclusive that these shares were of the value of 2,000*l*. Then in December the son makes an assignment of his effects, and although that came to

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nothing, bankruptcy speedily followed. The debts were at least 2,000*l.*: the assets *nil*. To my mind the thing speaks for itself.

CAVE, J.:

I am entirely of the same opinion, and upon the evidence I should have come to the same conclusion as the County Court judge did had I been sitting in his place. One ground of complaint was that the County Court judge refused to allow the appellant to give additional evidence in answer to the *viva voce* evidence as to the value of these shares, and we have now before us the affidavits which the appellant would be prepared to put in if he were allowed to do so. Now I have looked at those affidavits, and I must say I have never seen anything more likely to damage the case of the appellant than these. One affidavit goes to show that the son was in difficulties on November 1st or 2nd, and then he told his wife who told her father-in-law about the company's money which he could not make up. Then on November 3rd this man who is in difficulties transfers to his father all his shares, without trying at all to ascertain what the value of the shares may be. Another affidavit is useful as showing the character of this man, and it says that the bankrupt in June, 1887, was offering these shares, which the appellant himself admits were worth over 1,000*l.* at least, for 500*l.* That shews the character of this bankrupt. The net result of the thing is that the father does not pay the money and take a charge on the shares, which if it had been done might have been some proof of *bona fides*. But he prefers to take a transfer of the shares without any bargain being made, and knowing the son is insolvent he sweeps off all the son has got and puts it into his own pocket. Practically he has taken all the son has got and has used it to pay the debt of the company in which he is so largely interested. The County Court judge was, therefore, right in his decision, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Clarke, Woodcock & Ryland*, agents for *J. T. Davies*,
Yeovil, for the appellant.

Robins, Burges & Co., agents for *H. J. & J. Watts*,
Yeovil, for the trustee.

PRACTICE.

IN RE MILES, EX PARTE TURNBULL.

Bankruptcy Rules, 1886, rule 134.

Notice of appeal—Preliminary objection—Interlocutory order in bankruptcy—Length of Notice—Rules of the Supreme Court, Order LVIII., rule 3.

DIVISIONAL
COURT.

BEFORE
FIELD, J.,
AND
CAVE, J.
1889.

June 3rd.

On Appeal from an order made in the County Court the preliminary objection was taken that the Appeal could not be heard on the ground that fourteen days' notice had been given, and the order appealed from being an interlocutory order, the notice of appeal must be a four days' notice in accordance with Order LVIII., rule 3, of the Rules of the Supreme Court, 1883.

The Court refused to allow the objection and decided to hear the appeal there being considerable doubt as to the nature of an interlocutory order in bankruptcy.

THIS was an Appeal from an order of the judge of the Leicester County Court directing that an order made by him on May 29th, 1888, be varied in so far as it restrained an action brought by the appellant *Turnbull* against the bankrupt, and that he be at liberty to proceed with such action, but only to the extent that such proceedings should not affect the estate, and that the appellant be subject to the costs of the trustee in the bankruptcy in respect of an application made in the suit.

E. Cooper Willis, Q.C. (Gazdar with him): for the appellant Turnbull.

The appellant is now appealing against the latter part of the order.

Sills:

I have a preliminary objection. The notice of appeal is bad. The appeal is under Order LVIII., Rule 3, of the Rules of the Supreme Court, 1883, which provides that "Notice of appeal from

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any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." This is an interlocutory order. By Rule 184 of the Bankruptcy Rules, 1886, appeals to the Court of Appeal are to be regulated by Order LVIII. In the present case the date of the order was March 23rd, 1889. Notice of Appeal was served on April 12th, 1889. That was within the twenty-one days allowed, but the notice was a fourteen days' notice. They took ten days too much. It ought to be a four days' notice, and that slip is fatal. In the case of *McAndrew v. Barker* (L. R. 7 Ch. Div. 701 : 47 L. J. Ch. 340 : 37 L. T. 810 : 26 W. R. 317), Sir George JESSELL, M.R., said: "This Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders, unless there has been on his part some conduct raising an equity against him." (Counsel also referred to *In re Mansel*, L. R. 7 Ch. Div. 711 : 47 L. J. Ch. 870 : 88 L. T. 408 : 26 W. R. 861.) This is clearly an interlocutory order. A final order is one which finally determines the proceedings in an action.

[CAVE, J.: That is just the difficulty. No one appears to know what an interlocutory order in bankruptcy really is.]

E. C. Willis, Q.C.:

A question was raised the other day in the Court of Appeal as to whether a certain matter in bankruptcy could be said to be interlocutory so as to be heard before two judges, and the suggestion was then made—though not by the Court—that there was no such thing as an interlocutory order in bankruptcy unless it was an order which ran "until further order of the Court."

[CAVE, J.: I do not say that I accept that definition, but if that is not right I think we may say that it is not very clear what an interlocutory order in bankruptcy really is.]

FIELD, J.:

It is my opinion that we had better hear this case.

CAVE, J. :

I think so too.

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The case was then proceeded with on the merits.

Solicitors : *J. T. Hincks*, Derby, for the appellant.

H. T. Moore, for the trustee.

—♦—
IN RE ARNOTT, EX PARTE BARNARD.

BEFORE
MR. JUSTICE
CAVE.
1889.
June 25th.

Bankruptcy Act, 1883, section 48.

Fraudulent preference—Charge given to solicitor for costs—Motive of debtor—Knowledge of act of bankruptcy.

On August 1st, 1888, the debtor gave to his solicitor who had acted for him in previous litigation with the petitioning creditor a charge on his house for costs, the solicitor at the same time agreeing to obtain for the debtor an advance of 250*l.* on such charge.

On August 31st, 1888, a receiving order was made against the debtor, the act of bankruptcy alleged being the departure of the said debtor from his dwelling house with intent to defeat his creditors on July 31st, 1888.

The debtor was adjudicated bankrupt and the trustee sought to set aside the charge as being a fraudulent preference of the solicitor and given to him with the knowledge of the act of bankruptcy.

Held: (1) That the object of the debtor being to benefit himself by getting the 250*l.*, and not to benefit the solicitor, the transaction was not a fraudulent preference.

(2) That an allegation against a solicitor of entering into an arrangement of this nature with knowledge of a previous act of bankruptcy was one which required to be supported by the strictest proof; and that there was nothing in the present case to lead the Court to come to any such conclusion.

THIS was an Application on behalf of the trustee in the bankruptcy for an order declaring that a charge given on August 1st, 1888, by

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the bankrupt to his solicitor, Mr. *Anthony Pulbrook*, on all his estate and lands at Ealing, known as Kirkconnel, for the payment of 900*l.* was fraudulent and void (1) as being a fraudulent preference within section 48 of the Bankruptey Act, 1883; or (2) on the ground that at the time of the execution of the same Mr. *Pulbrook* had notice of an available act of bankruptey previously committed by the debtor; or (3) in the further alternative that the charge was void on the ground that the consideration for the same had failed, and that the said charge was given upon a condition which had not been performed by Mr. *Pulbrook*; or (4) that Mr. *Pulbrook* might be ordered to pay over to the trustee a sum of 250*l.* obtained by him for the bankrupt, and at his request, upon the security of the said charge.

On August 31st, 1888, a receiving order was made against the debtor, *A. J. Arnott*, upon a creditor's petition, the act of bankruptey alleged being that the debtor on July 31st, 1888, departed from his dwelling house or otherwise absented himself with intent to defeat and delay his creditors. On November 20th, 1888, the debtor was adjudicated bankrupt.

The petitioning creditor, *F. S. Barnard*, had for some years previous to the bankruptey acted as broker for the bankrupt upon the Stock Exchange, with the result that at the end of the year 1887 a balance was found to be due from the debtor to his broker for moneys paid and commissions of 1,960*l. 15s. 1d.*

On November 1st, 1887, a writ was issued by *Barnard* against the debtor for this amount and on June 25th, 1888, an order was made in the action whereby all questions were referred for trial to the official referee. The reference terminated, after a hearing of five days, on July 24th, 1888, Mr. *Pulbrook* having acted as the debtor's solicitor throughout the action, and on that day the referee stated that his decision would be in favour of the plaintiff, and on July 31st, 1888, intimation was given that his report had been filed.

On August 1st, 1888, the solicitors for the plaintiff, *F. S. Barnard*, received from Mr. *Pulbrook*, the debtor's solicitor, a notice of that date in the following form:—"Take notice that by a Memorandum of Charge under seal of this date, Archibald James Arnott, of Kirkconnel, Ealing, in the County of Middlesex, has charged to

me for securing the sum of 900*l.* and interest at 5 per cent., all his estate and interest in the land and premises known as Kirkconnel, Ealing, aforesaid subject to your clients' first charge thereon of 1,800*l.*—Dated this 1st day of August, 1888."

On August 3rd, 1888, judgment was signed in the action pursuant to the report of the referee for 1,960*l.* 15*s.* 1*d.*, and execution was issued, but on August 8th, 1888, the sheriff's officer reported that the debtor had left his residence at Ealing, and it was then ascertained that the house was deserted, and that the debtor had removed his furniture and quitted the premises on July 31st, 1888, without leaving any address.

On August 18th, 1888, an order was obtained by *F. S. Barnard* for substituted service of a bankruptcy petition upon the debtor, but the debtor never surrendered himself for examination and was adjudicated bankrupt in his absence.

The petitioning creditor was subsequently appointed trustee in the bankruptcy, and he now applied that the charge given by the bankrupt to *Mr. Pulbrook* on August 1st might be declared void.

Abrahams (Bigham, Q.C., with him) : for the trustee.

The present motion is really founded on what was got out at a private examination of *Mr. Pulbrook* and his clerk named *Elliott*. The bankrupt has never been examined. He left England and a warrant for his arrest was obtained upon charges under the Debtors Act, 1869. He was ultimately apprehended in Belgium, but his extradition was refused by the Belgian Government. *Mr. Pulbrook* in his examination before the registrar stated that before August 1st, 1888, he was continually asking the bankrupt to settle up in respect of his costs. The bankrupt had suffered losses on shares and was short of ready money. He was also being sued by one or two companies for calls, and was indebted to various stockbrokers. On August 1st the debtor called on *Mr. Pulbrook* at his office and was told that judgment could be signed at once, and *Mr. Pulbrook* also explained to the debtor the effect of a bankruptcy notice. The trustee alleges that the debtor then told *Mr. Pulbrook* that he had removed his furniture and was leaving Ealing, but he gave no address, and said he would let him know where he was shortly. At this time *Mr. Pulbrook* had rendered no cash account or bill of

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costs to the debtor, but on his asking him for some security the debtor finally consented to give the charge upon Mr. *Pulbrook* getting him an advance of 250*l.* on it. The arrangement was in writing as follows:—"August 1st, 1888. I hereby agree to obtain for you the sum of 250*l.* within a week from this date, upon the security of your house and premises, Kirkconnel, Ealing." The debtor made it a condition that the money should be advanced to him and he was to go to fetch it when it was obtained. After receiving the charge Mr. *Pulbrook* deposited it with the London & South-Western Bank and obtained a loan of about 300*l.* on the security, but although he subsequently saw the debtor on several occasions he retained the whole sum. The points of the case are that the bankrupt having employed *Pulbrook* as his solicitor is anxious on the eve of his going away to provide for his costs. He preferred his solicitor, and at his request was induced to give him this charge, he having left his dwelling house on the previous day. The question is whether the motive of the bankrupt was to prefer the solicitor. Then there arises the further question, irrespective of motive, whether Mr. *Pulbrook* was not aware that the bankrupt had left his dwelling house under such circumstances as to defeat his creditors. The position of *Arnott* was that he was at the end of his tether. He was being sued by several companies and was in a hopelessly insolvent condition. That being so, and *Pulbrook* not wishing the bankrupt to go away without making provision for him, he asked the bankrupt to give him the charge. The bankrupt at first demurred until *Pulbrook* dazzled his eyes with the bait of the promised loan for 250*l.* The bankrupt had two motives (1) to prefer *Pulbrook*; and (2) to get the 250*l.*: but the fact of there being two motives does not prevent the fraudulent preference if the dominant view was to prefer the solicitor. Then as to the knowledge of insolvency on the part of Mr. *Pulbrook*, he admits that he pressed the bankrupt for money and could not get any. He must have known that he was in a bad way. This charge is void as a fraudulent preference and it is also void because the solicitor had notice of the act of bankruptcy.

R. Vaughan Williams, Q.C. (McIntyre with him): for Mr. *Pulbrook*.

The trustee has clearly made out no case here. There was no fraudulent preference. Mr. *Pulbrook* in his affidavit swears that as early as February, 1888, he told the bankrupt that unless he gave him a charge on the house he would not go on. If it were necessary I could bring the case within the rule that where there is an antecedent agreement, if the delay is explained, the matter dates from the agreement. But here there was no fraudulent preference at all. There was no view to prefer *Pulbrook*, and it is plain that the bankrupt did not do so. There was the condition that the bankrupt should get the 250*l.* cash, and the real motive was that the bankrupt wanted to get that money. Mr. *Pulbrook* pressed the bankrupt to keep his promise and he would not, but at length he said, "If I give you a charge there will be money over, will you undertake to obtain for me on this security the sum of 250*l.*" I say at once, however, that I think the trustee in the bankruptcy is now entitled to have that agreement carried out. As to the other point, Mr. *Pulbrook* denies absolutely that he had knowledge of any act of bankruptcy.

CAVE, J.:

There are four points made in the case: first, that the charge of Judgment August 1st was a fraudulent preference; secondly, that it was void because it was taken by *Pulbrook* with knowledge of an act of bankruptcy; thirdly, that the charge itself was conditional, and that the condition had not been complied with; and fourthly, that the trustee is entitled to stand in the shoes of Mr. *Arnott* and require payment of the 250*l.*, which in his letter of August 1st Mr. *Pulbrook* undertakes to pay. That last point is not disputed. With regard to the other three there has been a considerable amount of argument. Now, I must say, that if there had been nothing more in this case than what there is down to July 31st, and if upon August 1st the debtor had given this charge for nothing, I should have little difficulty in coming to the conclusion that his view in giving that charge at that time, and under the circumstances which he then was, was to give a fraudulent preference to *Pulbrook*. But I think the stipulation that he was to have 250*l.* out of the amount makes all the difference, and that he had no intention,—or rather I should say that his main object and

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intention were not in any way to benefit Pulbrook, but to benefit himself, by getting hold of this sum of 250*l.* During the whole of those previous days while this litigation was going on, Mr. Arnott, if he had been so minded,—minded, that is to say, simply to benefit Pulbrook,—might have given him the charge apparently without in any way interfering with any objects of his own, unless it was that he wanted to sell the house, which may perhaps have been the reason why he made no attempt to deal with it in any other way. When, however, we get to August 1st, he had undoubtedly made up his mind that he could no longer face his creditors. Under those circumstances it was absolutely impossible for him to carry out his original intention of selling the house and putting the proceeds into his own pocket. Then there occurred to him another method by which he might get some portion of the proceeds into his pocket. It was with that view, as I believe, and not with the view of preferring Mr. Pulbrook, that he entered into that arrangement of August 1st, and consequently in my judgment it was not a fraudulent preference.

Now comes the second point. Although it was not a fraudulent preference, yet was it, or was it not, void upon the ground that Mr. Pulbrook had notice of an act of bankruptcy. That is a very serious allegation indeed, because Mr. Pulbrook is a solicitor, and, therefore, must be taken to know, at all events, the ordinary principles of the law of bankruptcy; and if he, with knowledge that the debtor had committed an act of bankruptcy, entered into this arrangement, that would have been a very gross fraud upon the creditors indeed, because he, at all events, would have known that the debtor had no power at such a moment to give a charge at all, and that, moreover, by undertaking to raise 250*l.* by means of that charge, and put it into the hands of the debtor, he was enabling him also to perpetrate a gross fraud upon the creditors to the extent of that 250*l.* Now charges so gross certainly require very strong proof indeed. What have I got here? I have substantially the evidence of Mr. Pulbrook. He says "I did not know of the existence of this act of bankruptcy." As a lawyer, if he had known of it, he must have known of course that the charge was perfectly invalid, and that consequently nothing but subsequent perjury would have enabled him to obtain any benefit out of that

charge given under those circumstances. He must also, as I have said, either have intended at the time further to defraud the creditors by putting 250*l.* of their money into the debtor's power, or he must have intended to refuse to do so on the ground that an act of bankruptcy had been committed, and then to defraud Mr. Arnott himself by taking this charge and making this promise, with knowledge of an act of bankruptcy, and then afterwards refusing, the circumstances otherwise remaining the same, to carry out his part of the bargain. A more scoundrelly action it would be difficult to conceive on the part of a solicitor who is bound to protect the interests of his client in the first place, and also at the same time to take care that he does not concur with him, or assist him, in robbing his creditors. I do not hesitate to say if it could be established that Mr. Pulbrook with knowledge of an act of bankruptcy had agreed to take this charge and raise 250*l.*, and put that 250*l.* into the hands of the debtor, that he would deserve to be struck off the rolls.

But how can I come to such a conclusion as that? He denies on his oath that he knew of the existence of an act of bankruptcy. What is there to show that he did? Well, it is said that he knew, or had reason to believe, that Mr. Arnott was in a state of insolvency. That is a totally different thing. He may have believed that Mr. Arnott was not able to pay 20*s.* in the pound, and, indeed, that is the very reason why, ordinarily speaking, it becomes necessary to press for security. When a man is able to pay 20*s.* in the pound, there is no object in getting a security from him. But as I have said, there is all the distinction in the world between insolvency and an act of bankruptcy. A man insolvent has still the power, provided he does not do it by way of fraudulent preference, of creating a charge for good consideration. But where he has committed an act of bankruptcy, then the property is no longer his to deal with, and a totally different set of circumstances come into operation. As I have said, therefore, the fact that Mr. Pulbrook had good reason to suspect that Mr. Arnott was insolvent, or even the fact that he knew it, goes for nothing here. What is there to show that he knew that Mr. Arnott had committed an act of bankruptcy? Absolutely nothing that I can see. Mr. Pulbrook swears that he did not know it. The trustee has not thought fit

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to give notice to produce him for cross-examination. He has not thought fit to give me the opportunity of judging from seeing Mr. Pulbrook himself, whether he is a man that I may fairly believe upon his oath, or whether he is a man whom I ought not to believe upon his oath, and I for my part am always extremely slow indeed to come to a conclusion that I ought not to believe a man upon his oath when I have not seen him or heard him examined upon oath, and when I am asked to come to the conclusion that he has committed perjury from a series of statements which do not necessarily produce any such conclusion in my mind, but which are only a circumstance at the outside of suspicion which he might explain if he were called before me in such a manner and with such a face and appearance, as would satisfy me that he was telling the truth and not committing perjury. Upon these grounds, therefore, I come to the conclusion that there is nothing that would justify me in holding or believing that Mr. Pulbrook had notice of this act of bankruptcy.

With regard to the third point, that was dealt with in the course of the argument. It is quite clear that this charge is not a conditional charge subject to be displaced if the money is not forthcoming; and the fact that the money was not paid over is, to my mind, in Mr. Pulbrook's favour. It is in accordance with what he would be expected to do if he had given this promise, and taken this charge at a time when he had no notice of an act of bankruptcy. Having given the promise, and taken the charge, as soon as he found that there had been an act of bankruptcy committed, then undoubtedly it was his duty to hold his hand and say "I cannot complete this transaction and hand you over this 250*l.*, because I now find that you have committed an act of bankruptcy, and consequently the money is not yours, and not therefore mine to hand over to you, but must belong to the trustee in your bankruptcy." I think, therefore, that the only order to make is to make an order declaring that the trustee is entitled to the 250*l.* out of the proceeds of this charge, and inasmuch as Mr. Pulbrook has already realized 300*l.*, I suppose I ought to go on to order him to pay 250*l.* of that over to the trustee. Is there any objection to that?

R. Vaughan Williams, Q.C. :—As I understand, my Lord, the

sum of 563*l.*, which is the surplus after paying the prior incumbrances, is in Court.

CAVE, J. :

Then the trustee must take 250*l.* and hand you the rest. There will be an order that 250*l.* of the amount in Court be paid to the trustee, and that the balance, or so much as may be required, be applied to the payment of Mr. Pulbrook's costs. The surplus, if any, will go to the trustee, and the trustee must pay the costs of this motion. There had also better be liberty to apply.

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Order accordingly.

Solicitors : *M. Abrahams, Son & Co.*, for the trustee.

A. Pulbrook, for the solicitor.

July 19th.

On this day, before the MASTER OF THE ROLLS (LORD ESHER), Lord Justice COTTON, and Lord Justice LINDLEY, an appeal from the above decision was set down for hearing in the Court of Appeal, but on the case being called on it was stated that the matter had been settled, and an order went "Appeal dismissed on terms agreed."



DIVISIONAL
COURT.

BEFORE
FIELD, J.
AND
CAVE, J.
1889.

July 1st and
2nd.

PRACTICE.

IN RE COOK, EX PARTE COOK.

Bankruptcy Act, 1883, section 28.

Discharge of Bankrupt—Absolute refusal—Neglect of bankrupt to keep proper books—Continuing to trade with knowledge of insolvency—Contracting debts without expectation of payment—Unfitness of bankrupt to be allowed to trade.

On application to the County Court for discharge, the official receiver reported that the bankrupt had brought himself within the provisions of section 28, sub-section (3) of the Bankruptcy Act, 1883, in that he had omitted to keep proper books, had continued to trade after knowing himself to be insolvent, and had contracted debts without reasonable ground of expectation of being able to pay them.

The report also stated that the debtor with knowledge that a creditor's petition had been presented against him, vexatiously filed a petition on his own behalf in another Court, and he was further charged with inducing his brother to put in a pretended proof against the estate, and with conducting his business by means of manufactured bills.

Held: That the County Court judge was right in absolutely refusing the bankrupt his discharge.

Per FIELD, J.—That in addition to the offences mentioned in section 28, sub-section (3) of the Bankruptcy Act, 1883, the other facts alleged against the bankrupt were important for the Court to consider in determining whether a trader who had been guilty of them, and who had also committed any of the acts stated in the section, should be allowed to trade again.

And see *In re Betts & Block, Ex parte the Board of Trade*, ante, Vol. IV., p. 170 : L. R. 19 Q. B. D., 39.

THIS was an Appeal on behalf of the bankrupt *Austin Cook* from an order of the judge of the Manchester County Court absolutely refusing his discharge.

On September 4th, 1885, a receiving order was made in the Wolverhampton County Court on the debtor's own petition and on the same day a receiving order was also made against the debtor in the Manchester County Court, on a creditor's petition, to which Court all the proceedings were subsequently transferred.

The bankrupt submitted three statements of affairs. The first

to the Wolverhampton Court, on September 18th, 1885, by which the liabilities expected to rank for dividend were stated at 2,047*l.* 16*s.* 9*d.*, the assets after deducting preferential claims being estimated as likely to realise 3,523*l.* 4*s.* 5*d.* In a statement submitted to the Manchester Court, on December 19th, 1885, the liabilities were stated at 2,987*l.*, and the assets as likely to realise 10,093*l.* 7*s.* 1*d.* And in a further statement submitted to the Manchester Court on March 21st, 1888, the liabilities were stated at 4,583*l.* 6*s.* 2*d.*, and the assets, there being no preferential claims, as likely to realise 61*l.* 17*s.* 3*d.*

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The amount actually realised by the trustee was 302*l.* 14*s.* 4*d.*, the proofs amounting to 3,316*l.* 9*s.* 2*d.* and no dividend whatever had been or was expected to be paid to the unsecured creditors, the assets being insufficient for the payment of the expenses of and incident to the bankruptcy.

On March 21st, 1889, the bankrupt applied for his discharge when the official receiver stated in his report (*inter alia*) as follows :—

“ Save as the Court may adjudge upon the facts and circumstances hereinafter reported, the bankrupt does not appear to have committed any misdemeanour under the Bankruptcy Act, 1883, or the Debtors Act, 1869. The bankrupt has committed the following acts or defaults mentioned in section 28, sub-section (3) of the Bankruptcy Act, 1883, viz :—

(a.) Has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position during the three years preceding his bankruptcy.

(b.) Has continued to trade after knowing himself to be insolvent; and

(c.) Has contracted debts provable in the bankruptcy without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them.

The bankrupt commenced business about 1868, having a capital of about 5,000*l.* The debtor's own petition was filed in the Wolverhampton Court on September 2nd, 1885. Inasmuch as a receiving order was made in the Manchester Court two days later, he must, at the time of filing his own petition, have had notice of

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the prior petition. His Honour the judge of the Wolverhampton Court certified that the proceedings would in his opinion be more advantageously conducted in the Manchester Court, and the proceedings were accordingly transferred to the latter Court. The reasons found by his Honour for the transfer are (*inter alia*) that the bankrupt seemed to have carried on trade in Manchester almost if not entirely, and not at Wolverhampton to any considerable if any extent; and that a receiving order was made in the Manchester Court on a creditor's petition on the same day on which a receiving order was made in the Wolverhampton Court. I have not been able to discover any good reason why the bankrupt, having had notice of the creditor's petition, should have filed his own, thereby lessening his assets by the costs of a second petition and by the costs of an application to transfer the proceedings. I have come to the conclusion that the debtor's own petition was filed vexatiously, and that neither his residence nor his carrying on business in Wolverhampton on which jurisdiction in that Court was founded, was *bond fide*, or such as to justify the filing his petition in that Court instead of in the Manchester Court. The office at Wolverhampton, which constituted his only residence, was taken by him within fourteen days before he filed his petition.

Neither the first nor the second statement of affairs contained any deficiency account. Further accounts were ordered by the Court, but the order was not complied with, and the bankrupt in respect of his non-compliance was committed for contempt. He purged his contempt by furnishing the accounts and paying costs. The first meeting of creditors was summoned to be held on September 18th, 1885, at Wolverhampton, but was adjourned to October 7th following. Between the two dates a proof sworn on October 5th, 1885, was lodged by Mr. *Robert Cook*, the bankrupt's brother, for 700*l.* for money lent in 1881, no security being disclosed by the proof. This creditor was not inserted in either the first or second statement of affairs. He was inserted in the third. The bankrupt admitted on the public examination that he asked his brother to claim in respect of this debt, and he did so. On October 29th, 1888, during the course of the public examination of the bankrupt, Mr. *Robert Cook* came into Court accompanied by his solicitor, and consented to an order to expunge the proof. There is no evidence

to show the considerations which led to the withdrawal. Mr. *Robert Cook* had been summoned for examination on the day the proof was withdrawn, but on the withdrawal of the proof he was not examined. The bankrupt alleges that he sold his brother certain shares, which turned out badly. It seems to have occurred to the bankrupt to treat the loss on these shares as a debt. I am of opinion that Mr. *Robert Cook's* proof would not have been tendered had not the bankrupt suggested it. I have had to consider whether the bankrupt knew or believed that in respect of this proof a false debt had been proved within the meaning of section 11, sub-section (7), of the Debtors Act, 1869. Having regard to the nature and extent of the evidence reasonably required to bring home an offence founded upon the knowledge or belief of the person charged and to all the circumstances of the case, I have come to the conclusion that there is no such evidence that the bankrupt had such knowledge or belief as to justify me in reporting his conduct as a misdemeanour under that sub-section. He has, I believe, made varying statements to the trustee as to this proof, but in my judgment his primary object in suggesting it was if possible to assist in keeping the proceedings at Wolverhampton.

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For some time prior to the month of September, 1882, Mr. *Joseph Cook*, the bankrupt's brother, carried on business in Lower King Street, Manchester, as a coal merchant, under the style or firm of the Lancashire and Yorkshire Coal Company, and on April 17th, 1888, the bankrupt filed an account of certain bills drawn upon the Lancashire and Yorkshire Coal Company amounting to 887*l.*, and the names of the persons to whom the bills were given. After Mr. *Joseph Cook* ceased to carry on the business he informed the bankrupt that he would have nothing to do with any bills drawn upon the company, and on April 11th, 1883, the bankrupt wrote a note to him certifying that he was in no way responsible for any bills that he (the bankrupt) might draw upon the company. This note was written in reply to one from Mr. *Joseph Cook*. At the time the several bills above mentioned were drawn the bankrupt had no authority from Mr. *Joseph Cook* to accept them on behalf of the company—in fact, the company had ceased to exist, and there was in my judgment no justification for accepting bills in the company's name. Although the evidence

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does not enable me to report the actual consequences of the negotiation of these bills, no creditor having to my knowledge alleged in Court that he was damnified thereby, and although it may be that they were bills given in respect of the pre-existing debts payable on the expiry of the periods of credit, and not in order to induce, and that they did not in fact induce, credit or forbearance, I submit for the consideration of the Court that to use spurious bills in the course of business as the bankrupt undoubtedly appears to have done is a grave offence against commercial morality, and that although there is not evidence to justify me in reporting that by means of these bills the bankrupt has obtained credit by a false representation or other fraud, and so been guilty of a misdemeanour, yet that the facts herein reported in respect to these bills are such as the Court may consider under section 28, sub-section 3 (h), of the Bankruptcy Act, 1883, as constituting conduct fraudulent in its nature and intention, and although the evidence does not fix the bankrupt with any misdemeanour created by the Debtors Act, and so subject him to the serious consequences thereby imposed. Attempts were made to obtain from the bankrupt an explanation of these bill transactions. It is difficult to understand clearly what explanation he intended to convey, and still more difficult to repeat it except at a great length; but the scope of it seems to be this, that he had handed to Mr. Joseph Cook a quantity of pin stocks, and he thought he had a right to draw against them. Mr. Joseph Cook on the other hand alleges, and I think truly, that the pin stocks were a gift to him and never produced him anything. However that may be, and giving full effect to whatever the bankrupt intended to convey, I submit to the Court that to draw and obtain acceptances of these bills was wholly unjustifiable, and that if there had been any debt owing by Mr. Joseph Cook to the bankrupt, or any justification for drawing bills which he was to accept, the bills ought to have been drawn upon him by his own individual name and not by the name and style of a non-existing company, and his own individual acceptance obtained according to commercial usage. There was no reason why this should not have been done if it had been proper and desired. Mr. Joseph Cook was at hand and could have been communicated with. The manner of preparing these bills appears to have been this. The bankrupt had in his employ

Mr. *William Henry Hancock* partly as a traveller and partly as a collector. He was in the habit of writing out the bodies of the bills. The bankrupt signed them as drawer, and Mr. *Joseph Barnes*, also in the employ of the bankrupt as a warehouseman at 26s. a week, wrote the acceptances. Mr. *Charles Warburton*, who was employed by the bankrupt first as a carter and then as a warehouseman at 20s. a week, was also in the habit of accepting bills for the bankrupt.

I am of opinion that all the unsecured debts appearing by the third statement of affairs to have been contracted after the end of 1881 were contracted after the bankrupt was insolvent to his own knowledge.

I further report to the Court that I had the greatest difficulty in conducting the public examination owing to the unwillingness of the bankrupt to give clear and proper answers. I would willingly, if I could, attribute this to his inability to give proper answers. I was brought into the case to supply the absence of Mr. *Dibb*, the official receiver, through illness. As far as I am able to judge from the notes, the persons conducting the previous part of the examination must have met with equal difficulty. I do not consider that I received any assistance whatever from the bankrupt in my endeavours to elicit an account, even such an one as it might have been in his own interest to give of the state of his affairs and the matters herein reported upon. To this to a great extent is to be attributed my inability to make a more concise report. It would have been useless in my opinion to have further adjourned the examination, and unsatisfactory as were the results obtained, I did not feel at liberty to ask for an adjournment *sine die*. I have felt that under the circumstances I should best discharge my duty to the Court by reporting the circumstances as fully as possible, and respectfully inviting the attention of the Court as I now do to the notes of the public examination and other documentary evidence in order that the Court may vary my report as to it shall seem just in case my conclusions be considered erroneous."

The County Court judge absolutely refused the bankrupt his discharge, and from that refusal he now appealed.

The bankrupt, *Austin Cook*, appeared in person, and asked the

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Court not to uphold an order by which his discharge was refused to him altogether, even though it might think fit to impose some conditions.

Muir Mackenzie: for the official receiver, and
Sparrow: for the trustee, were not called upon.

FIELD, J.:

Judgment.

We need not trouble you, Mr. Mackenzie. This is an appeal by Austin Cook, the bankrupt, against an order refusing his discharge. The official receiver has reported the grounds upon which the Court has acted in refusing that discharge, and the question before us is whether or not the bankrupt has brought any evidence or has been able to use any valid argument tending to satisfy us that the report of the official receiver should not be entitled to consideration and to the weight which the statute endeavours to give it. The statute first of all lays down the limits of what this Court is to do, and what is to be done by a bankrupt who is desirous of obtaining his discharge. He may at any time apply to the Court, and on the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and then having taken that into consideration, the Court may either grant or refuse an absolute order of discharge or suspend the operation of the order, or grant it subject to conditions; provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act or Part II. of the Debtors Act, 1869, and shall on proof of any of the facts hereinafter mentioned either refuse the order, or suspend it according to the previous legislation. The statute sets out certain facts, and the material ones are that the bankrupt has omitted to keep such books of account as sufficiently disclose his business transactions and financial position within the three years immediately preceding the bankruptcy; that he has continued to trade after knowing himself to be insolvent; that he has contracted a debt without having at the time any reasonable or probable ground of expectation, proof whereof shall lie upon him, of being able to pay it; that he has put any of his creditors to unnecessary expense, and has given any undue preference.

The first four (*a*), (*b*), (*c*), and (*d*) of the facts stated in the section are the material facts which are relied upon in the present case by the official receiver. But besides that the official receiver has found certain facts which, although they do not range themselves under any of these four heads, yet are matters important and fit to be taken into consideration when we are considering whether a trader who has been guilty of them and who has also committed any of the acts stated in the section shall be allowed again to trade. No doubt, in the present case, the bankrupt has been four years without obtaining a discharge, but then the official receiver finds that that has been due to his own conduct, to his own refusal or inability to give anything like the proper assistance which the official receiver has a right to expect in the matter. Therefore, let us consider shortly whether or not the bankrupt has established any ground for saying that those facts alleged by the official receiver do not exist. The report is to be considered as, and it has the character and the attributes of, a report by an officer of the court, by a master, or any person to whom the Court delegates the inquiry into a very complicated matter, and therefore the report of the receiver stands in the same position with regard to this Court as any of those reports or certificates stand. Among other things, therefore, it stands that statements made in the report are accurate, unless the bankrupt is able by reference to the evidence, or by reference to proofs which he is able to furnish, to establish that those things are without foundation. The material facts found are these:—After stating various facts attending the bankrupt, first of all going over to Wolverhampton for the purpose of making a residence there. Secondly, that although the bankrupt must have known that there was a petition presented at Manchester, a place where his business transactions were carried on and he had resided, he purposely (as found by the official receiver) goes over to Wolverhampton and endeavours by presenting his own petition there to prevent the carrying on of an inquiry into his affairs which would be much more properly conducted at Manchester where he resided, and thereby putting expense on the parties and endeavouring evidently to get the matter disposed of by a tribunal which would not have the same opportunity of investigation that the other would. What are the next material facts he finds? He

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finds that the bankrupt has submitted three different statements of affairs: the first he submitted to the Wolverhampton Court on September 18th, and by the first statement which was made by the bankrupt the liabilities expectant only were 2,047*l.* 16*s.* 9*d.*, and the assets were stated to be 3,523*l.* 4*s.* 5*d.* In the second statement at the Manchester Court the liabilities were stated at 2,987*l.*, and the assets at 10,083*l.* 7*s.* 1*d.*; and in the third statement the liabilities were increased. In the third statement the liabilities were stated at 4,583*l.* 6*s.* 2*d.*, and the assets, there being no preferential claims, were expected to realise 61*l.* 17*s.* 8*d.*, and no further amount was expected. The proofs reported by the trustee amount to 8,816*l.* 9*s.* 2*d.* after deducting Robert Cook's proof. What does the state of things shew? It is clearly conclusive to shew that the bankrupt could not have kept any books which sufficiently disclosed his business transactions and financial position within the three years preceding the bankruptcy—quite conclusive—because he himself was unable, knowing as he did all the business, to do anything more than furnish these different and varying accounts both of liabilities and of assets. It is quite certain that that charge is proved up to the hilt. Now the official receiver goes on to say that no dividend has been paid, the assets being insufficient to an amount not yet ascertained for the payment of the expenses of and incidentals to the bankruptcy. Mr. Cook has before us complained of the particulars making up the amount of assets, and has sought to say that there are some other assets which ought to have been received. We must accept this report. Therefore, what does that shew? It shews a state of insolvency a man must have anticipated and therefore brings the case within the sub-section (c), that he has contracted debts provable without at the time of contracting them having any reasonable or probable grounds of expectation of being able to pay. That Statute imposes specifically on the bankrupt proof that he had reasonable and probable ground for contracting this large amount of debt without any assets whatever. Under these circumstances the report goes on to say that he does not appear to have committed any misdemeanour under the Bankruptcy Act, and therefore upon that ground it does not refuse his discharge; but he has committed the following act of default: *viz.*, omitted to keep books of account. A parade was made of producing books

the other day ; it was said, let the books be here, and they will shew. We have had no books shewn us in any shape or way to qualify the report, and as I have said just now, the report on that part of the case appears to be clearly well founded.

Those are the three grounds I have stated, (a), (b), and (c). Besides that, there are many other circumstances stated in the report which tend to shew that the bankrupt is not a man who ought to be allowed to recommence any trade. There was no deficiency account either on the first or second statement of affairs, and such was his conduct on that occasion that he was committed for contempt. He has given us to-day a statement on affidavit to the effect that, on the same day that the order of committal was made the proceedings were filed, and it is perfectly clear that his conduct was such that the Court committed him on that day. A further matter of considerable importance is also stated. It appears at the first meeting of creditors at Wolverhampton this happened, that after that, when it was adjourned to October 7th—in the meantime Robert Cook, the bankrupt's brother, deposed to a proof of 700*l.* for money lent in 1881. That proof disclosed no security whatever. What is the meaning of that ? The case depended solely upon the testimony of the brother of the bankrupt, and there was no voucher of any kind, I. O. U., bill of exchange, or mortgage by way of security. What happened next ? First of all this claim was not contained either in the first or the second statement of affairs ; it was never inserted until the third one, and the bankrupt admitted on the public examination that he asked his brother to claim in respect of the debt, and that the brother did so. What happened next ? On October 29th, during his public examination, the brother comes into Court and consents to an order to expunge the proof. No notice-is given at any time to shew what was the ground on which the proof was sought to be made, or what was the ground upon which it was afterwards withdrawn ; all that the bankrupt says is that he sold his brother a certain share which turned out badly, and the inference which is drawn in the report is this, that the bankrupt seems to have thought it desirable to treat it as a debt ; and the official receiver comes to the conclusion that the proof by Robert Cook would not have been tendered unless the bankrupt had requested it. I think he adopts a very wise and

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prudent course with regard to this matter. He says he hesitated to find him guilty of a misdemeanour, because that would have to be inquired into, and inasmuch as that would be a criminal charge, of course the proof of that lies upon the Crown, and any reasonable doubt or suggestion might, of course, be entertained. Therefore, I think he has adopted a prudent course in not finding it to amount to a misdemeanour, but at the same time bringing it before the Court for the purpose of their considering it when they are judging whether or not the bankrupt is a man fit to be trusted again with the carrying on of trade.

Then next comes a very serious matter, and that is the manufacturing of bills. Of course, there can be no question at all about it on the facts as found here, that those bills which we had the witness in the witness-box about, and which were signed by two people in the employment of the bankrupt, as if by procuration of the Lancashire and Yorkshire Coal Company, were absolutely without any warrant at all, and those bills were paid away to a creditor. Anything worse I cannot imagine on the part of a trader. First of all his brother was the Yorkshire and Lancashire Coal Company; his brother had ceased to carry on business as that, and there was no such thing in existence as the Lancashire and Yorkshire Coal Company, and yet, notwithstanding that, the bankrupt induces Hancock, his servant, to fill up bills purported to be accepted by some person as the procurator of the Lancashire and Yorkshire Coal Company, and the persons who do that are a warehouseman and a man who was a horsekeeper. Nothing can be worse than that.

It is not necessary for me to go any further. It seems to me that the bankrupt has failed to qualify or extenuate or diminish any of the charges or offences brought against him by this report, and therefore I am of opinion that the Appeal must fail.

CAVE, J.:

I am entirely of the same opinion. When a man becomes bankrupt and has failed to pay a dividend, and that state of affairs has been brought about under such circumstances as are disclosed in this case, to my mind it is proved to demonstration that a man who can do those things is not a proper person to be allowed to trade on his own account. He has shewn an utter inability to

comprehend the first elements of commercial morality, and it is clear that he is quite unfit to be allowed to trade again, and he must content himself with the minor position of a clerk.

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Appeal dismissed.

Solicitors : *Cuddon & Co.*, for the bankrupt and for certain creditors supporting the appeal.

The Solicitor to the Board of Trade, for the Official Receiver.

Grundy, Kershaw & Co., for the trustee.

PRACTICE.

IN RE HART & SON, EX PARTE HART.

Bankruptcy (Discharge and Closure) Act, 1887, section 2.

Bankruptcy Act, 1869, section 125, sub-section (10).

Liquidation by arrangement—Refusal of debtor's discharge by creditors—Liquidation closed—Discharge granted at subsequent meeting—Refusal of Registrar to grant certificate. June 25th and July 2nd.

BEFORE
MR. JUSTICE
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On June 12th, 1884, at a meeting of the creditors of a debtor whose affairs were being liquidated by arrangement under the Bankruptcy Act, 1869, resolutions were passed releasing the trustee and closing the liquidation, and it was also resolved that the discharge of the debtor be not granted ; but at a subsequent meeting held on April 11th, 1889, a resolution was obtained whereby the discharge of the debtor was granted, and application was thereupon made to the County Court Registrar under section 125, sub-section (10) of the Bankruptcy Act, 1869, for a certificate to that effect.

The County Court Registrar refused to certify the discharge on the ground that the resolution in question was *ultra vires* and that the creditors had no power to pass it.

Held : That the Registrar was right in refusing to grant a certificate ; and that the proper course for the debtor to take was to apply to the Court for his discharge under section 2 of the Bankruptcy (Discharge and Closure) Act, 1887.

THIS was an Appeal, *ex parte*, on behalf of *J. Hart* from the refusal of the judge of the County Court at Coventry to direct the

1889. registrar of the said County Court to certify the discharge of the
IN RE appellant as a liquidating debtor under section 125, sub-section (10)
HART & SON, of the Bankruptcy Act, 1869.
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The case raised an important question as to the right of a person who had been adjudicated bankrupt, or who had presented a liquidation petition under the Bankruptcy Act, 1869, to apply for his discharge under the provisions of that Act, notwithstanding the passing of the Bankruptcy (Discharge and Closure) Act, 1887.

On April 17th, 1882, a petition under the Bankruptcy Act, 1869, was presented to the Coventry County Court by the appellant, *J. Hart*, and his father, who carried on business in co-partnership at Coventry and Bedworth as ribbon manufacturers under the style of Hart & Son.

On May 10th, 1882, the first meeting of creditors was held, at which it was resolved that the affairs of the debtors should be liquidated by arrangement and not in bankruptcy, and Mr. *C. H. Caldicott*, of Birmingham, accountant, was appointed trustee, with a committee of inspection.

At a meeting of creditors, held on June 12th, 1884, resolutions were passed releasing the trustee and closing the liquidation, and it was also resolved "that the discharge of the debtors be not granted."

On April 11th, 1889, however, the official receiver, assuming to act as trustee in the liquidation under the provisions of section 160 of the Bankruptcy Act, 1889, summoned a meeting of the creditors, at which the discharge of the appellant, *J. Hart*, was resolved upon, and application was thereupon made to the County Court registrar under section 125, sub-section (10) of the Bankruptcy Act, 1869, to certify the discharge.

The matter was referred by the registrar to the County Court judge with an expression of opinion that the resolution in question was *ultra vires*.

The County Court judge, in affirming the decision of the registrar, after stating the facts, said: "For the applicant it was argued that the resolutions of 1884 were inoperative in refusing the discharge of the debtor, and that the proceedings were not thereby closed, and that the official receiver has been by legislation subsequent to 1869 placed in a position of trustee of a

continuing liquidation, and that the provisions of 50 & 51 Vict. c. 66, did not apply, because the trustee had been released and there was no one to whom notices under rule 4 of the rules under the Act could be given. It is unnecessary to consider whether the official receiver is or is not in the position which a trustee would have occupied if the liquidation had not been closed, because I am of opinion that the omission in the resolutions of 1884 to grant the discharge did not invalidate the resolution directing the close of the liquidation, and that if the contention that the resolution refusing the discharge was inoperative as a refusal be right, the only effect must be that the resolutions of 1884 must be read as if no resolution relating to the discharge had been inserted therein at all. It is said then that this is a hardship on a liquidating debtor who has in such a case no means of obtaining his discharge. There are, in my opinion, two answers to this contention: first, that the principle of the case cited to me of *In re Scholes, Ex parte Royle* (47 L. J. Bank. 28), applies, and if the creditors by their resolution put this debtor into such a position that he could not obtain his discharge from them, the Court will, on being satisfied of the propriety of doing so, grant it of its own authority; the second is, that section 2 of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), affords a complete remedy. I do not attach any importance to the difficulty said to arise under rules 4 and 5. Considering that it may be an arguable question whether the notices under these rules ought to be given to the released trustee or to the official receiver, one of three alternatives must necessarily be right. Either the notice must be given to the released trustee or to the official receiver or it is altogether unnecessary. If, therefore, the debtor gives the notice both to the official receiver, and to the released trustee, and in other respects acts in compliance with the provisions of the Act and rules of 1887, he will have a *locus standi* to be heard, and his application will be then heard and considered by the Court on the merits. And I must add that any other decision on the point raised would have the effect of defeating the express enactment of section 2 of the Act of 1887, which in plain and unmistakeable terms vests in the Court the power and responsibility of granting or refusing an application for discharge

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1889. in all cases in which the discharge had not been then obtained

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~~HART.~~ without making any distinction between pending and closed proceedings. And it not only does this, but lays down certain

rules for the guidance of the Court in its action which would not be binding on the creditors under the Act of 1869, but which are in harmony with the legislation introduced by the Act of 1883, whose principles it was I think then intended to apply to all cases of discharge of debtors whether the proceedings were commenced prior or subsequent to the coming into operation of that Act."

From this decision *J. Hart* now appealed.

Sidney Woolf: for the debtor.

The real ground why the County Court judge and the registrar refused to grant this certificate was that they appear to be of opinion that since the passing of the Bankruptcy (Discharge and Closure) Act, 1887, an undischarged liquidating debtor or bankrupt must apply under that Act, and cannot apply under the procedure provided by the Act of 1869. It is said that he must apply to the Court, and cannot obtain a resolution of the creditors. But the Act gives the bankrupt the option, and this debtor availed himself of the procedure under the Act of 1869 and obtained a full resolution. By section 2 of the Bankruptcy (Discharge and Closure) Act, 1887, "A debtor who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, and who has not obtained his discharge, may apply to the Court for an order of discharge, and thereupon the Court shall appoint a day for hearing the application in open Court." There is simply an option to the debtor to apply under that Act, and it does not take away the right of the debtor to apply for his discharge under the Act of 1869.

July 2nd.

CAVE, J.:

Judgment. This was an application by Hart the younger by way of an appeal against an order of the County Court judge at Coventry affirming the refusal of the registrar of that Court to register a resolution of the creditors granting the appellant his discharge.

The bankruptcy was an old bankruptcy under the Act of 1869, which in fact resulted in a liquidation by arrangement, and some years ago there was a resolution of the creditors refusing Hart his discharge and closing the bankruptcy. Quite recently a further meeting was held, at which the creditors have resolved to grant the discharge, and it was that resolution which the debtor asked the registrar to register. The registrar refused on the ground that the creditors had no power to pass the resolution, and the County Court judge upheld the refusal.

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Now I have read the judgment of the County Court judge, and I must say that I entirely concur in it. It seems clear that the creditors, having closed the liquidation in 1884, had no power now to pass a resolution granting the debtor his discharge. It may be that the creditors ought not to have placed themselves in such a position, but if any difficulty arose in respect of the debtor there were two ways out of it, as the County Court judge has pointed out. He might have applied to the Court to relieve him of its own authority, and now at any rate by the Bankruptcy (Discharge and Closure) Act, 1887, there is express power given to the Court to grant a debtor his discharge on his application in such a case as this. That is the course the debtor ought to have adopted, and he ought not after the liquidation was closed in 1884 to have summoned such creditors as would attend a meeting, and get them to pass a resolution which they had no right to do.

Appeal dismissed.

Solicitors: *Crowders & Vizard, agents for Browetts, Coventry,*
for the debtor.



DIVISIONAL
COURT.

BEFORE
FIELD, J.,
AND
CAVE, J.
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July 4th
and 5th.

IN RE McKEAND, EX PARTE McKEAND.

Bankruptcy Act, 1883, section 4, sub-section 1 (d).

Act of Bankruptcy—Departing from dwelling-house with intent to defeat or delay creditors.

On March 8th, 1889, the debtor, as a condition that time should be allowed him for payment of certain bills in respect of which he had become liable as surety, agreed to produce his books to an accountant for inspection, but instead of doing so he instructed an auctioneer to sell certain of the book debts with the proceeds of which he paid the debts of two favoured creditors.

From March 14th to the 16th the debtor absented himself from his dwelling-house leaving dishonoured a promissory note which had fallen due on March 13th, and having made no provision for the payment of another bill which became due during his absence.

A receiving order having been made against the debtor in the County Court founded on his absence as an act of bankruptcy the debtor appealed.

Held: That the intention of the debtor in absenting himself was to delay his creditors; and that the receiving order was rightly made.

THIS was an Appeal on behalf of the debtor from a receiving order which had been made against him in the Blackburn County Court, the ground for the appeal being that no act of bankruptcy had been committed.

The debtor, *Alexander McKeand*, carried on business as a travelling draper, and lodged at 26 Henry Street, Blackburn, but he also had a warehouse at No. 20 in the same street, which he alleged was used only for the storage of goods, and kept locked up, his business requiring his frequent absence from home on different rounds throughout the country.

In March, 1889, a writ was issued against the debtor by the Blackburn Bank for the sum of 200*l.* in respect of an overdrawn account, and he was also indebted to his brother to the extent of 100*l.* for arrears of wages.

On March 9th, 1889, the debtor sold by auction certain book-debts, with the proceeds of which he paid these two creditors; but a promissory note given to another creditor, which fell due on March 18th, was dishonoured, and no provision was made to meet

a further promissory note for 22*l.* which became due two days afterwards.

The debtor was also aware that if, as appeared probable, another brother of his, for whom he had become surety, failed to meet certain acceptances, he could not continue to carry on his business.

On March 14th, 15th, and 16th, 1889, certain creditors called at different times at the debtor's residence in respect of the payment of their debts, but found it closed, and a bankruptcy petition was subsequently presented in the County Court, the act of bankruptcy alleged against the debtor being that under section 4, sub-section 1 (*d*), of the Bankruptcy Act, 1883, which provides that a debtor commits an act of bankruptcy "If with intent to defeat or delay his creditors he . . . departs from his dwelling-house or otherwise absents himself."

A receiving order was made, against which the debtor now appealed, on the ground that his absence did not amount to an act of bankruptcy, and that there was no intention that the creditors should be thereby defeated or delayed.

Yate Lee: for the debtor.

The debtor did not leave his house with any intent to defeat his creditors. He was a travelling draper travelling round the country, and he constantly was away. When he was away his warehouse was shut. He was never absent except for the purpose of business. As a matter of fact, he was away on March 14th, 15th, and 16th, in connection with matters arising out of the sale of the book-debts on March 9th. The debts sold were at Nelson and Brierfield, and the debtor was absent there for the purpose of introducing the purchaser and explaining the sale to his customers. The debtor alleges that before he went away he left word at his lodgings where he was going. He also states that as soon as he heard that the creditors had called in his absence he tried all he could to see them and ascertain what they wanted. My case is that on these days the debtor was away as usual on business, and it is wrong to say that his absence amounted to an act of bankruptcy. (Counsel referred to *Ex parte Meyer, In re Stephany*, L. R. 7 Ch. Ap. 188:

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25 L. T. N. S. 783 : 20 W. R. 178 : *In re Wolstenholme, Ex parte Foster & Co., see ante, Vol. IV., p. 258.*)

Herbert Reed : for the petitioning creditor.

Every fact in this case makes it plain that the debtor desired to avoid meeting his creditors. As early as on March 8th he was present at a meeting of the creditors of the brother for whom he had become surety, and he was then told that if his brother did not meet certain bills he would have to do so. He then asked for time, and time was given to him on condition that he would produce his books next day to a Mr. Chesney, an accountant. He promised to do so, but instead of that, on the very next day he went to an auctioneer and put up his book-debts for sale, and would not allow the least delay. That sale was not to pay the creditors generally, but to pay what he calls wages to his brother Walter and to pay the bank. The real fact was, that this debtor wanted to keep out of the way until he had disposed of his property and distributed it amongst certain favoured creditors. There was ample evidence of intention to defeat and delay. The facts go far to show a deliberate fraud, for a bill of the debtor's for 7*l.* 10*s.*, which fell due on March 18th, was dishonoured, while on March 15th a bill for 22*l.* was becoming due, and when the creditor called about it he could not find the debtor, who had made no preparation for the payment of it. The debtor was determined to keep out of the way until he had realised his property, and he stayed away in order that people could not call on him and demand their debts.

FIELD, J.:

Judgment.

Notwithstanding all the industry displayed by Mr. Yate Lee in this case, he must prove unsuccessful. The facts of the case are peculiar. There were three brothers named McKeand living at Blackburn, and one of them was Alexander McKeand, the debtor, who had for a servant his brother Walter. Really all we know of the debtor's position in March, 1889, is from his own affidavit. He says that he was pressed by two creditors. A writ had been issued against him by the Blackburn Bank for about 200*l.*, while his brother Walter was pressing for some 111*l.* wages in arrear. He also owed 23*l.* for rent. Now when a man has rent and wages in

arrear, it shows plainly that his affairs are not in very good order. The first thing a man does is to keep his rent paid and then wages, in order to keep his business going. Then the debtor says that with a view to satisfy those claims—not to make himself a trustee for all his creditors—he authorised a sale by auction of certain book-debts. The sale took place, and out of the proceeds his brother Walter was satisfied, and the amount of the debt and costs paid to the bank. The affidavit is very general as to dates, which is usually the way in a case of this nature, but we learn from other evidence that previous to this, on March 8th, a meeting of the creditors of another brother had been held, and it appears that the debtor had also put his name to acceptances for his brother. The debtor then asked how he would be placed as to those acceptances, and he was told that he would have to meet them if his brother did not. That was clearly intimated to him then. The whole family were not very prosperous, but the debtor said that if time were given him he could meet the bills, and he was told that time would be given if he would produce his books next day to Mr. Chesney, an accountant, which he promised to do. The meaning of that was, that if the creditors were satisfied that the debts were good, time would be given.

Now on March 9th the debtor did not go to Mr. Chesney, but he did go to Mr. Birtwistle, an auctioneer, and he instructed him to sell certain of his books. Mr. Birtwistle said, "I suppose you will have the sale on Thursday so that due notice may be given," but the debtor would not have it so by any means, and directed that the sale should take place on the Tuesday night. The debtor knew at that time that he had two promissory notes falling due, one for 7*l.* 10*s.* to a Mr. Mather, on March 13th, and the other for 22*l.* on March 15th. March 13th was Wednesday, and March 14th was Thursday. He had made no attempt to meet these bills, and on March 14th he went away. He says he came back late in the evening, but on March 15th he went away again and did not come back until after 12 o'clock on March 16th. Now, with what intent did he leave his dwelling-house? A man must be taken to intend the reasonable consequences of his acts. He had dishonoured on March 13th the 7*l.* 10*s.* bill, and he knew that he would dis-honour on March 15th the 22*l.* bill.

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1889. Then what happens next? Between March 13th and 15th he received the money for the book debts which had been sold. He does not pay the trade bills, but he hands it to two favoured creditors. He is absent on March 14th, 15th and 16th, and he left nobody to answer inquiries, though he must have known that somebody would be coming. Even after he came home there is a conflict of evidence as to what occurred, the debtor saying that he went out to try to find a creditor who had called, while the creditor says he only met him by accident. Under the circumstances it seems to me to be a fair inference that the debtor's absence was not only due to a desire to realise the book debts, and so commit a fraudulent preference, but also to delay his creditors,—to keep them off at any rate until the transaction was completed, and the two creditors whom he wished to favour had been paid.

CAVE, J.:

I am entirely of the same opinion. It is clear from the statement made by the debtor that on March 8th he knew that if he had to pay the bills of his brother he could not pay his creditors in full. He had that fully in his mind from March 8th to March 16th. On March 8th the creditors say, "Produce your books and we will give you time," and if he had any expectation of paying his creditors in full that was one of the means by which he could do so, viz., if time were given him. But he goes to an auctioneer and tells him to sell in a great hurry, and he proceeds to realise his assets and to pay certain creditors, being convinced he could not pay his creditors in full. He sells a portion of his debts, and although a promissory note was dishonoured on March 13th and one was falling due on March 15th, he goes away without making any provision for them. I agree with Mr. Yate Lee that if the debtor had been away on his ordinary business of selling goods and collecting money in the usual way it would be difficult to say that he was away with intent to defeat or delay his creditors. But this man was away for the deliberate purpose of realising assets and altering the distribution of them. He had deliberately rejected the offer of time made to him, and he was determined to realise assets and pay some creditors to the exclusion of others. In pursuance of that plan he was away on March 14th, 15th and 16th. He did realise a considerable sum

of money, not one fraction of which was used in meeting the promissory notes, and there is no expectation of their being paid. In my opinion the County Court registrar under the circumstances could not come to any other conclusion than that to which he did come, and the appeal must be dismissed.

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Appeal dismissed.

Solicitors : *Holland & Callis*, for the debtor.

Rowcliffes, Rawle & Co., agents for *Needham, Parkinson & Slack*, for the petitioning creditor.

IN RE LOPES, EX PARTE HARDAWAY & TOPPING.

BEFORE
MR. JUSTICE
WILLS.
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Bankruptcy Act, 1883, section 37.

July 20th.

Proof—Action for commissions executed—Judgment under Order XIV.—Bankruptcy—Rejection of proof—Gaming transaction—Right to go behind judgment.

On July 8th, 1887, judgment was signed under Order XIV. in an action brought against the debtor to recover the sum of 520*l.* alleged to be due for commissions executed and moneys paid on his behalf by the plaintiffs who carried on business as turf commission and betting agents.

The judgment debt was not satisfied and a bankruptcy notice was subsequently issued against the debtor upon which he was adjudicated bankrupt, but a proof tendered by the plaintiffs in the action in respect of their debt was rejected by the official receiver as trustee, on the ground that the claim was founded on gaming transactions.

Held : That the fact that the judgment had been obtained was not conclusive ; and that the plaintiffs having failed to satisfy the Court that the debt arose from commission business, the decision of the official receiver must be affirmed.

THIS was an Appeal on behalf of Messrs. *Hardaway & Topping* from the decision of the chief official receiver as trustee in the bankruptcy, by which he rejected a proof tendered by them against the estate for the amount of 520*l.*

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The case was taken specially on the ground of urgency before Mr. Justice WILLS, sitting for the Bankruptcy Judge, during the absence of Mr. Justice CAVE on circuit.

The appellants, Messrs. *Hardaway & Topping*, carry on business as turf commission and betting agents in Fleet Street and also at Boulogne, and on April 23rd, 1887, a writ was issued by them against the debtor, *R. K. Lopes*, in respect of 520*l.* alleged to be due to them for commissions executed and moneys paid on behalf of the said debtor.

On proceedings under Order XIV. of the Rules of the Supreme Court, 1883, leave was given to the debtor to defend the action only on the condition of his paying the money into Court, which he was unable to do, and on July 8th, 1887, judgment was signed.

Some negotiations thereupon took place between the parties, but no settlement being arrived at, a bankruptcy notice under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, was issued against the debtor, upon which a receiving order was made on May 25th, 1888, and the debtor adjudicated bankrupt.

On September 3rd, 1888, a proof in respect of their debt was carried in by Messrs. *Hardaway & Topping*, which was subsequently rejected by the official receiver as trustee.

From that rejection Messrs. *Hardaway & Topping* now appealed.

E. Cooper Willis, Q.C. (Carrington with him): for Messrs. Hardaway & Topping.

The official receiver appears to have rejected this proof on the ground that it was a case of direct betting. But the appellants are here, and will state clearly that they were instructed by the debtor to make these bets on his account. The appellants have got judgment after a contest, and the judgment is *prima facie* evidence. It is for the other side to impeach it.

[*Mr. Topping and Mr. H. J. Selby*, junior partner in the firm, were called in support of their case and were cross-examined.]

Herbert Reed: for the trustee.

I submit there is really no case to answer. The action was for money paid by a person employed as an agent—money paid at

request. There must be some proof of payment, and there must also be a request. Here there is no proof of any payment at all. No books have been produced which show anything, and the only explanation is that the books are destroyed every year.

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E. Cooper Willis, Q.C.:

The appellants have got a judgment and a judgment is *prima facie* evidence. Of course, I know the case of *Ex parte Revell, In re Tollemache* (L. R. 18 Q. B. D. 720: 54 L. J. Q. B. 89: 51 L. T. 376: 33 W. R. 288), but in that case the judgment was forty years old. It is for the person who impeaches a judgment to show that there is no consideration. Here the evidence shows that the appellants had directions to make the bets, and that the bets were made. Now only when the proof is put in the question of direct betting is raised. (Counsel also referred to *Ex parte Banner, In re Blyth*, L. R. 17 Ch. Div. 480: 44 L. T. 908: 30 W. R. 24: *Ex parte Ritso, In re Ritso*, L. R. 22 Ch. Div. 529: 52 L. J. Ch. 536: 48 L. T. 376: 31 W. R. 373.)

WILLS, J.:

In my opinion the official receiver came to a right conclusion in Judgment. rejecting this proof. It is said that the judgment was conclusive, but that argument appears to have been previously raised unsuccessfully in the Court of Appeal, and I cannot give effect to it. It seems to me that the true rule is that every case is a question of circumstances. The judgment is *prima facie* evidence, but when you have got behind the judgment and have got all the facts you must not be bound by the judgment, and you must look at the whole facts.

Now here there was a judgment obtained under Order XIV., the debtor having been put under a condition which he could not comply with. It seems to me that the matter was not fought out between the parties at all. The debtor was ordered as a condition of defence to bring money into Court. The case is an illustration of what I think is an undesirable position in which a judge is placed in ordering money to be paid into Court under such circumstances. It does seem to me that the number of cases are very few in which that ought really to be done, and where it cannot be said either

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that the plaintiff ought to have judgment or the defendant leave to defend. The present case is a clear example of how it handicaps a man who has no money, to tell him that if he pays money into Court he can set up his defence and see what he can make of it. I do not think I should myself have made such an order in this case, and it is idle to say that the question in dispute was fought out.

Now a great deal more has been brought before me to-day. I have the whole story of the plaintiffs, and a more unsatisfactory story I never heard in a Court of Justice. These gentlemen carry on a large business, partly of betting on their own account and partly of commission business. But they seem to keep no accounts, and it rests entirely on their own statement whether particular bets were their own or whether they represent bets which they had paid to other people for the gambler who was dealing with them. What would be said in the case of any other man who carried on business partly on his own account and partly on commission if he had no books to distinguish between the character of the account? Is there anything that because these people were carrying on a gigantic gambling establishment they should have consideration? People of this kind may of course recover if they can prove that they have paid money for another, but they must prove their claim. What these people say is that they have rendered accounts weekly, but those accounts show nothing. There is nothing to distinguish between bets lost and commission business, and when, as here, the person chiefly put forward in support of the claim is on his own confession a better on a gigantic scale, can it possibly be said that they are entitled to indulgence? Moreover, the affidavits which have been read are open to the greatest possible suspicion, and one of them at any rate was made by a partner who knows nothing at all about the business. There is only one phrase in these affidavits in which there is the slightest approach to pledging an oath that commissions were executed or that money was paid. In one place it is said that commissions were from time to time executed, but it is by no means said that the balance arose from these commissions. The affidavit stops carefully short of that, and when we come to find how that account was made up, by means of the telegrams and Ruff's Guide, can the appellants expect in a serious matter like

this to succeed with nothing better than their bare word that they were commission matters? It seems to me that no jury would hesitate for one moment to say that they had not made out their case. I think there is plenty to enable me to go behind the judgment, and I will even go further, and say that I am satisfied on the circumstances that the appellants have no solid ground for the statements which have been made. The official receiver was quite right in rejecting the proof.

I only wish to add one word. I consented to hear this case because it was represented to me to be an urgent case. I certainly should not have done so had I known what kind of case it was. I cannot see that it was an urgent case, and some of the parties to it at any rate certainly do not deserve the slightest consideration. I wish to say nothing which at all reflects on those at whose representations I consented to hear the case, but I do think that I ought not to be taken away to hear a case of this nature at a time when the Queen's Bench Division is so short-handed owing to the absence of nearly all the other judges from London. I say no more. I have heard the case and decided it, and my decision is most distinctly that the appeal must be dismissed.

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Appeal dismissed with costs.

Solicitors : *W. E. Ruddle*, for Messrs. Hardaway & Topping.
W. D. Dowding, for the official receiver.

September 5th.

On this date the receiving order against the above debtor was rescinded and the adjudication annulled, the debts having been paid in full, together with interest at 4 per cent.



BEFORE
MR. JUSTICE
WILLS.
1889.
July 22nd.

Bill of sale—Assignment of reversionary interest—Chose in action—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), section 4—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), section 8.

A testator by his will gave to his wife (*inter alia*) "the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and subject as aforesaid, I give and bequeath all my said pictures to and for my son (the debtor) for his own absolute use and benefit."

After the death of the testator, but during the lifetime of the mother, the debtor executed an assignment of mortgage by way of security for an advance by which, as mortgagor and beneficial owner, he assigned (*inter alia*) "all that the share and interest of him the said (debtor) under the will and codicil of his father deceased and of and in the sums of money, hereditaments and premises devised and bequeathed thereby, expectant upon the decease of his mother."

A receiving order having been subsequently made against the debtor upon which he was adjudicated bankrupt, the trustee in bankruptcy applied for an order declaring that he was entitled, as against the mortgagee, to the pictures in question, on the ground that the assignment had not been registered.

Held: That the only interest which the bankrupt had in the pictures was a *choze in action*, and as such it was not affected by the Bills of Sale Acts.

THIS was an Application on behalf of the trustee in the bankruptcy for an order declaring that he was entitled to certain pictures bequeathed to the bankrupt by his father subject to the life interest of the bankrupt's mother.

The case was taken specially on the ground of urgency, before Mr. Justice WILLS, sitting for the Bankruptcy Judge during the absence of Mr. Justice CAVE on circuit.

The father of the bankrupt by his will gave and bequeathed to his wife *Elizabeth Ann Tritton* for her own absolute use and benefit certain watches, jewelry, trinkets, &c., and the will continued:—"I also give to my said wife the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and, subject as aforesaid, I give and bequeath all my said pictures to and for my son, *H. J. Tritton*, for his own absolute use and benefit."

- The testator died, and Mrs. Tritton, who is still alive, retained possession of the pictures under the right so given to her.

On March 28th, 1884, *H. J. Tritton* executed an assignment in favour of one *Raymond* by way of security for an advance of 2,500*l.*, by which as mortgagor and beneficial owner he assigned *inter alia*, "All that the share and interest of him the said *H. J. Tritton* under the will and codicil of his father, *Henry Tritton*, deceased, and of and in the sums of money, hereditaments, and premises, devised and bequeathed thereby expectant upon the decease of his mother, *Elizabeth Ann Tritton*."

On April 26th, 1888, a receiving order was made against *H. J. Tritton*, upon which he was adjudicated bankrupt, and the pictures were now claimed by the trustee subject to the life interest of Mrs. *Tritton*, on the ground that the assignment in question required to be registered as a bill of sale.

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E. Cooper Willis, Q.C. (F. C. Willis with him): for the trustee.

The question simply is whether the assignment of the pictures to the respondent ought to have been registered as a bill of sale. The bequest in the father's will was a bequest to the son subject to the wife's right of possession and enjoyment. The assignment was an assignment of mortgage *inter alia* of these pictures for a sum of 2,500*l.* It required to be registered as a bill of sale. In the case of *The Manchester, Sheffield & Lincolnshire Railway Company v. The North Central Wagon Company* (L. R. 18 H. L. 554), Lord HERSCHELL said, "The Bills of Sale Act, 1882, contains no definition of a bill of sale. For that we are thrown back to the earlier statute, viz., section 4 of the Act of 1878, which enacts that 'the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for the purchase-moneys of goods, and other assurances of personal chattels.' It must be borne in mind that the object of the earlier Bills of Sale Acts was entirely different from that of 1882. The former enactments were designed for the protection of creditors, and to prevent their rights being affected by secret assurances of chattels which were permitted to remain in the ostensible possession of a person who had parted with his property in them. The bills of

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sale were, therefore, made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. The purpose of the Act of 1882 was essentially distinct. It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions. A form was accordingly provided to which bills of sale were to conform, and the result of non-compliance with the statute was to render the bill of sale void, even as between the parties to it." If this had been an absolute gift to the wife with an ulterior reversion to the son, it would have been an executory bequest. But here it is not so. The testator only gives the possession to the wife. This is an absolute gift of the property to the son with the right of possession to the wife. It avoids an executory bequest. It was in the mind of the testator that there was a wide difference between property and possession, and that subject to the possession of the wife the property is to pass to the son.

Watt (Lynch with him) : for Mr. Raymond.

This document is not a bill of sale at all. The interest of the bankrupt in these pictures is not such as could be conveyed by a bill of sale. The interest of the bankrupt was merely a reversionary interest. His right was simply a chose-in-action, and a chose-in-action is exempted from the operation of the Bills of Sale Acts. The only interest which the bankrupt had was in the nature of a chose-in-action. The grantor of a bill of sale must have the right of disposing of the things at the time that he grants them, and this transaction is entirely without the scope of the Bills of Sale Acts (Counsel referred to *Colonial Bank v. Whinney*, see *ante*, Vol. III. p. 207 : L. R. 11 App. Cas. 426 : 56 L. J. Ch. 43 : 55 L. T. 862 : 34 W. R. 705).

Sidney Woolf: for Mr. Gosling, another mortgagee.

If the thing that was mortgaged was a chose-in-action the trustee has no possible right to it. What was assigned here is the interest of the bankrupt under the father's will which can only be a chose-in-action. When the case of the *Colonial Bank v.*

Whinney was before the Court of Appeal (see *ante*, Vol. II. p. 234; L. R. 30 Ch. Div. 286), Lord Justice FRY, in his judgment, said : "Property in chattels personal, says Blackstone, may be either in possession, which is where a man has not only the right to enjoy, but has the actual enjoyment of the thing : or else it is in action, where a man has only a bare right, without any occupation or enjoyment." The interest of the bankrupt here was a bare right without any occupation or enjoyment during the life of his mother, and that was all the bankrupt could assign. In *In re Bainbridge, Ex parte Fletcher* (L. R. 8 Ch. Div. 218 : 46 L. J. Ch. 98 : 36 L. T. 758 : 25 W. R. 573), "B. as trustee and executor of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his father and another. In pursuance of a provision in the will, B. continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September, 1872, B. assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership and in the goodwill of the business, with the repayment of the money due. New articles of partnership were then entered into between B. and the old partner, in which the former appeared as the owner of one half the business. In June, 1877, B. was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner. It was held, as between B.'s trustee in bankruptcy and the mortgagee, that the mortgage of B.'s share and interest in the partnership was a charge upon a *chose-in-action*, and as such, was not affected by the Bankruptcy Act, 1869, section 15, or by the Bills of Sale Act, 1854." Also in *Ex parte Rawlings, In re Davis* (37 W. R. 142), "The debtors deposited with a creditor as security for his debt certain hire-purchase agreements of furniture, and subsequently executed an assignment by which they assigned all their rights under the said agreements to the creditor. Due notice of the assignment was given to the hirers, and the debtors shortly afterwards became bankrupt. It was held that all that was dealt with by the assignment was a *chose-in-action*, and that it did not require to be registered as a bill of sale ; and that the creditor was entitled to the

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benefits of the said hiring agreements as against the trustee in the bankruptcy." That was affirmed by the Court of Appeal in the case of *Ex parte Rawlings, In re Davis* (L. R. 22 Q. B. D. 198 : 37 W. R. 208).

Herbert Reed : for Mr. Gourley, another mortgagee.

Under a document such as this there cannot be said to be any assurance of personal chattels so as to bring the case within the Bills of Sale Acts. Personal chattels cannot be settled. In Jarman on Wills, 4th Ed., Vol. I., at page 879, the learned editor says "No remainder can be limited in real and personal chattels, every future bequest of which, therefore, whether preceded by a partial gift or not is in its nature executory." The case given there is *Manning's Case* (8 Rep. 95), where a man possessed of a term of years devised it to B. after the death of A., the testator's wife, and directed that in the meantime she should have the use and occupation during her life: it was contended that the devise to A. during her life gave her the whole term, and that therefore the devise over was void; but after much argument three judges held that B. took not by way of remainder but by way of executory devise: and it was ruled that there was no difference between a gift of the land itself and of the use or occupation or profits of the land. If chattels are given to one for life and after the determination of that estate the chattels are given to B., B. takes no interest until the death of the tenant for life, and on the death of the tenant for life his right springs into existence, and previously to that he has only a right in action. The interest here is a *chose-in-action*, and any charge on the interest under the will, and the pictures, is merely a dealing with a *chose-in-action*.

Kent and Webster also appeared for other mortgagees.

E. Cooper Willis, Q.C. : in reply.

All the argument on the other side seems to be that this is a *chose-in-action*. But *choses-in-action* were never intended to apply to furniture at all, and even if so, this was a bequest of furniture to the bankrupt, subject to his mother's right of enjoyment. In all these mortgage deeds the bankrupt is described as the "beneficial

owner." Now it is contended that he was not the owner, but had only a chose-in-action to pass. The clear intention of the testator was that there should be a legal transfer of these goods to the bankrupt at once, subject to his mother having the enjoyment of them for life.

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WILLS, J.:

I wish to preface my judgment with a short statement why I Judgment. allowed this case to be taken as urgent at this time, and when the state of business is in the condition in which it is owing to nearly all the judges being away from London. I do not want there to be any risk of the opinion going abroad that I am willing always to certify a case as urgent if I am asked to do so. From what was represented to me there is urgency here, because an offer has been made to the trustee for the purchase of these pictures, which offer is only open until September, and the question therefore had to be settled. That appeared to be a reason why I should hear the case at this exceptional time.

Now having said that, I must say that notwithstanding the discussion as to the difficulty of the present case, I do not entertain any doubt as to which way my judgment should go, and so I will give judgment at once. In my opinion the case of the trustee fails, and it fails upon the short ground that the only interest which Tritton, the bankrupt, had in these pictures was a chose-in-action, and therefore expressly excepted from the Bills of Sale Acts by section 4 of the Act of 1878. It seems to me clear upon the authorities that you cannot have life estates and remainders out of personal chattels, and that the interest which this lady took is definite and it comes first, and entitles her to the enjoyment and possession of these things—that is, to the property in these things during her lifetime. It seems to me that the interest of the son was an executory bequest, which creates no present or vested interest, and which, if the mother survived him, would never come into operation. In my opinion it is clearly in the nature of a chose-in-action—or I will say it is a chose-in-action—and nothing higher, and expressly excepted from the operation of the Bills of Sale Act. I found my judgment on that, and I do not think it necessary to travel further into the thorny paths of the law relating to Bills of

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Sale, which has already given rise to many difficulties. The motion must be refused, and the trustee must pay the costs, but he may recoup himself out of the estate if there is any.

Application refused.

Solicitors : *Chester, Mayhew & Co.*, for the trustee.

G. C. Scoles, for Mr. Raymond.

Nash, Field & Withers, for Mr. Gosling.

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PRACTICE.

COURT OF
 APPEAL.

IN RE ABSHURY, EX PARTE ASHBURY.

BEFORE THE
 MASTER OF
 THE ROLLS,
 LINLEY,
 L.J.,
 BOWEN, L.J.
 1889.
 August 9th.

Receiving Order—Appeal from by Debtor—Consent of Petitioning Creditor to have Receiving Order set aside.

Where on an appeal from a receiving order it was stated that the petitioning creditor had been settled with, and with his assent, the debtor applied that the receiving order might be set aside, the Court refused to rescind the receiving order and directed that the case should go back to the Registrar for his decision.

THIS was an Appeal on behalf of the debtor *J. Ashbury*, from a receiving order which had been made against him by Mr. Registrar Giffard on the petition of one *J. C. Ellis*.

Yate Lee : for the debtor.

Sidney Woolf (Jacobs with him) : for the petitioning creditor.

Yate Lee :

The appeal is one which arose out of a dispute as to the petitioning creditor's debt but it is not necessary now to go on with it. The matter has been settled. It was a dispute as to whether an amount had been paid. Now the question has been settled and my friend consents to my asking that the receiving order be rescinded.

[THE MASTER OF THE ROLLS. Is it now agreed that the amount had been paid at the time when the receiving order was made or has it been paid since ?]

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I cannot say it is agreed that the amount was paid when the receiving order was made, but it is paid now.

[THE MASTER OF THE ROLLS. In that case I am not sure that we ought to accede to your request and rescind the receiving order.]

[BOWEN, L.J. Is there any authority in such a case ?]

There is a case of *In re Fletcher, Ex parte Fletcher* (see ante, Vol. IV. p. 118), in which it was laid down by the Divisional Court that "Where after a receiving order has been made against a debtor on a bankruptcy notice the petitioning creditor is settled with, and with his assent the debtor appeals for the purpose of having the receiving order set aside, it would appear that notice should be given to the official receiver, and where this was not done the Court discharged the receiving order as prayed, but directed that the order should not be drawn up for four days, and notice be given to the official receiver so as to enable him to come forward if he thought fit."

[BOWEN, L.J. It would be a little difficult to do that in this case because of the long vacation which commences immediately.]

THE MASTER OF THE ROLLS (LORD ESHER) :

It seems to me to be a case for the registrar to deal with. I think the case should go back to him. The registrar says that he will give you an appointment on Monday at 2 o'clock and you had better go before him then.

LINDLEY, L.J. and BOWEN, L.J., concurred.

Case referred back.

Solicitors : *Tahourdin & Co.*, for the debtor.

Linklaters & Co., for the petitioning creditor.

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APPEAL.

BEFORE THE
MASTER OF
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LINDLEY,
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October 25th.

PRACTICE.

IN RE FRENCH, EX PARTE FRENCH.

Bankruptcy Act, 1883, sections 95 and 97, and section 7, sub-section (4).

Bankruptcy Rules, 1886, Rules 18 to 26.

Bankruptcy Petition presented in the wrong Court—Jurisdiction to make receiving order—Judgment debt—Appeal pending from judgment—Discretion of Registrar as to stay of bankruptcy proceedings.

Where a bankruptcy petition is presented in the wrong Court by inadvertence such Court has jurisdiction to hear the petition and to make a receiving order.

The mere fact of a bankruptcy petition being presented in the wrong Court by inadvertence will not invalidate the jurisdiction; and by section 97 of the Bankruptcy Act, 1883, the proceedings can be removed into the proper Court.

The case of *In re Brightmore, Ex parte May*, (see *ante*, Vol. I., p. 253; L. R. 14 Q. B. D. 37) approved.

Where a bankruptcy petition is presented by a creditor founded on the failure of the debtor to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the Registrar whether he will stay the proceedings or not, and the judgment debtor cannot in such case under section 7, sub-section (4) of the Bankruptcy Act, 1883, claim a stay of proceedings as of right.

Where the Registrar in the exercise of his discretion refuses to stay the proceedings, the Court of Appeal will not interfere with his decision, unless it is clearly of opinion that the discretion was wrongly exercised.

See also *In re Rhodes, Ex parte Heyworth*, *ante*, Vol. I., p. 269.

As to whether a bankruptcy petition can be presented and a receiving order made against a debtor who states that he has no other creditor except the petitioning creditor and no assets to distribute, see the case of *In re Hecquard, Ex parte Hecquard*, post, p. 282.

THIS was an Appeal on behalf of the debtor *J. E. French*, from a receiving order which had been made against him by Mr. Registrar Linklater.

The petitioning creditor was one *Ball*, the trustee in the bankruptcy of *T. S. Ashwin*, and the debtor now appealed against the receiving order which had been made against him on three

grounds:—(1) That the London Bankruptcy Court had no jurisdiction to make the receiving order as the residence and domicil of the debtor were in the country: (2) That the order was made in the matter of a judgment for costs in the High Court upon which an appeal was pending: and (3) That this judgment debt was the only debt of the debtor and that he had no assets to distribute.

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Morton Daniel: for the debtor.

As to the first point the only evidence upon which the registrar could act in this case was an affidavit of the debtor in which he stated that he lived at Southsea, and that he had only been once to the office in London where it was alleged he transacted business. The London Bankruptcy Court had therefore no jurisdiction to make the receiving order. Section 95 of the Bankruptcy Act, 1883, provides: “(1) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London Bankruptcy District as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court: (2) In any other case the petition shall be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition: (3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.” By section 97 it is provided: “(1) Subject to the provisions of this Act every court having original jurisdiction in bankruptcy shall have jurisdiction throughout England: (2) Any proceedings in bankruptcy may at any time and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may by the like authority be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced.” (Counsel referred to *In*

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re Brightmore, Ex parte May, see *ante*, Vol. I. p. 253 : L. R. 14 Q. B. D. 37 : 51 L. T. 710 : 38 W. R. 598.) Then as to the second point, a man who has been made a debtor under a judgment from which an appeal had been lodged has a right to claim that proceedings in bankruptcy against him for that debt shall be suspended pending the hearing of the appeal. Section 7, sub-section (4), of the Bankruptcy Act, 1889, provides that "When the Act of Bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment." Moreover in this case the affidavit of the debtor showed that he had no other debts, and had no property to be distributed. Proceedings are taken in bankruptcy for the purpose of distributing the property of a debtor amongst his creditors, and here there was only one debt and no estate to distribute. Even if it was in the discretion of the registrar to make the order, he ought not to have done so on the merits of the case.

Bartley Dennis: for the petitioning creditor was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

In this case three grounds have been stated in support of the Appeal and I will take them in order. In the first place it was said that there was no jurisdiction in the London Bankruptcy Court to make this receiving order, because the debtor was resident in the country and had not resided or carried on business within the London Bankruptcy District for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in any other district. Now it is clear that by the decision in *In re Brightmore, Ex parte May* (see *ante*, Vol. I. p. 253), the proper construction was put by the Divisional Court on sections 95 and 97 of the Bankruptcy Act as applicable to cases of this nature. When a receiving order has by inadvertence been made in the wrong Court, that is not sufficient ground to make out no jurisdiction. By the provisions of section 97 the proceedings can be removed to the proper Court, and this

would imply that the jurisdiction of the first Court is not ousted, but is only transferred. In the present case it is not contended that the commencement of the bankruptcy proceedings in London was otherwise than by inadvertence. As a matter of fact there is only the statement of the debtor on affidavit that he has no residence in London on which the suggestion of such inadvertence can be raised. No harm could in any event be done to the debtor by the inadvertence, if there were such, because section 97 provides for the removal of the proceedings to any other Court. Rules 18 to 26 of the Bankruptcy Rules, 1886, which provide for the transfer of proceedings, equally assume that there is no want of jurisdiction owing to the proceedings being commenced in the wrong Court. The first point which the debtor has raised, therefore, must fail.

Then it was said that the judgment of the High Court, on failure to comply with which the receiving order was petitioned for, being the subject of an appeal, the registrar had no power to make a receiving order under such circumstances. But by the construction of section 7, sub-section (4), of the Bankruptcy Act, 1883, the mere fact of an appeal being pending is not sufficient as of right to prevent a receiving order being made. The matter is within the discretion of the registrar, and we must act upon the well-known rule, that we will not interfere with discretionary powers unless we are clearly of opinion that the discretion was wrongly exercised. In this case I fail to see any reason for being of such clear opinion. The registrar in his discretion held that the appeal did not appear to be a hopeful one, and it seems to me that my view of it would be very much the same.

But it was further contended that no receiving order ought to be made upon the mere neglect of the debtor to pay a debt under a judgment, if it is shown to be the only debt he owes, and that he has no assets to be distributed. It was said that if an order is made under such circumstances it is an abuse of the bankruptcy law. It is not necessary for us in this case to determine whether this is good ground for staying a bankruptcy proceeding, because this debtor fails to prove either fact. The mere statement which he makes in his affidavit is not sufficient, and he ought to show in his examination before the Court that such is the state of the case before any appeal to us could be made on any such ground.

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In my opinion the appeal fails on all points and must be dismissed.

LINDLEY, L.J. and LOPES, L.J., concurred.

Appeal dismissed.

Solicitors: *T. S. Ashwin*, for the debtor.

Newman, Hays & Co., for the petitioning creditor.

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IN RE BRYANT, EX PARTE GORDON.

BEFORE
MR. JUSTICE
CAV.P.
1889.
October
29th and 30th.

Bankruptcy Act, 1883, section 90.

Costs of trustee—Duty of trustee in instituting litigation—Order to pay Costs personally—Right of trustee to property in possession of bankrupt.

Although a trustee in bankruptcy has a right to bring motions and initiate proceedings, which, if properly brought, will be paid for out of the assets of the estate, if he so acts as to recklessly institute litigation and causes matters to be brought before the Court, where by proper management litigation might have been avoided, the costs of such proceedings will not be allowed out of the estate, but the trustee will have to pay the costs out of his own pocket.

At the time of the bankruptcy there were at the chambers occupied by the bankrupt previous to his absconding certain pictures which were taken possession of by the landlord of the chambers, who refused to give them up to the trustee without proof of title, or unless an indemnity were given to him against any risk of an action for conversion, in the event of the said pictures afterwards being claimed by third parties.

Held: That the contention of the landlord that before giving up the pictures he was entitled to call on the trustee to prove his title could not be allowed; and that the pictures having been in the possession of the bankrupt, the rights which he had in them devolved upon his trustee.

THIS was an application on behalf of one *John William Gordon* for an order that certain pictures which had been removed from his chambers by the trustee in the bankruptcy should be given back to

him, or that he might be indemnified in the event of their ever being claimed by third parties : and for a further order that certain papers which admittedly belonged to the applicant should be returned to him forthwith.

The bankrupt *O. Bryant*, who formerly carried on business as a solicitor, afterwards entered as a student at the Inns of Court, and rented chambers at No. 3, Elm Court, Temple, Mr. *John William Gordon* being the landlord of the said chambers under the Inn.

In March, 1889, the bankrupt, who had entered largely into building speculations, became involved in difficulties and absconded, being subsequently adjudicated bankrupt, in his absence, in the London Bankruptcy Court.

At the time of the bankruptcy there were, amongst other things, at the chambers at 3, Elm Court certain property in the possession of the bankrupt including a revolver and three pictures stated to be of considerable value by *Hobbema*, *Vanderveldt*, and *Romano* respectively.

On a claim being made by Mr. *R. T. Carr*, the trustee in the bankruptcy, to these pictures, however, Mr. *Gordon*, the landlord, refused to deliver them up without proof of the trustee's title to them being furnished to him, but the trustee subsequently obtained possession of the pictures by withdrawing an undertaking he had given not to remove them by means of which he obtained the key of the chambers for the purpose of removing property which admittedly belonged to the bankrupt.

An application was now made by Mr. *Gordon* that the pictures should be given back to him, or that he should be indemnified in case they were ever claimed by any other persons ; and also that certain papers which had been taken away by the trustee belonging to him and not to the bankrupt might be returned.

There was a cross-motion by the trustee claiming the revolver, which had remained in Mr. *Gordon's* possession.

Stewart: for Mr. *Gordon*.

There is no desire whatever on the part of Mr. *Gordon* to keep these pictures as his own. He is only desirous of being protected against an action for conversion in the event of their ever being claimed by a rightful owner. There were serious allegations

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against this bankrupt of misappropriating trust property. Mr. *Gordon* only wishes to be protected against any possible action for parting with the pictures. When the bankrupt absconded he left certain furniture in the chambers, and also these three pictures leaning against the wall. The trustee is of opinion that they may be of considerable value if they are original as he says that pictures by Hobbema have fetched 1,200 and 2,300 guineas recently. There is no evidence that they were the bankrupt's property. As a matter of fact when the bankrupt absconded, Mr. *Gordon* was left in possession of the pictures and he was entitled before giving them up to ask the trustee to show that they were the property of the bankrupt. But it is not necessary to go so far as that here. Mr. *Gordon* entered into negotiations with the trustee, and this question was to stand over and the key of the chambers was given to the trustee on the distinct understanding that the pictures would not be removed. But the trustee suddenly withdrew the undertaking and removed the pictures. Therefore, even supposing my first contention is wrong, the trustee cannot give an undertaking and then break it without putting Mr. *Gordon* back in the position in which he was before. Mr. *Gordon* does not want the pictures at all, but he simply thought he was in danger of an action for conversion by the rightful owner if he gave them up. The law about conversion is not very clear on a matter of this kind, and Mr. *Gordon* only requires some assurance that he is safe.

Herbert Reed: for the trustee.

The position assumed by the applicant really appears to be that if one person is in possession of goods and goes out of possession and another person takes possession the real owner is put to prove his title. I am not going to argue any such question. If the bankrupt is in possession of goods his trustee takes all his rights and the goods must be given up to him. There does not seem to be any suggestion that the trustee withdrew his undertaking without notice to *Gordon*. I expect what the trustee said in plain language was that he would not stand any more nonsense. Then as to the motion by the trustee that Mr. *Gordon* should give up the revolver. It belongs to the trustee and must be given up to

him. As to the papers which Mr. Gordon claims they were taken away by mistake and he can have them at any time.

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CAVE J. :

This is litigation which never ought to have come before me. Judgment. It is lamentable to see the money of the creditors wasted in a case of such a nature as this. As to the first part of the motion which asks that the trustee may be ordered to deliver up papers belonging to Gordon, it is admitted that the papers belonged to him and the trustee ought to have given them up without the necessity of any motion being made.

With regard to the revolver and the pictures the blame is in my opinion pretty evenly divided. Mr. Gordon's contention is quite inadmissible. The pictures and the revolver were in the possession of the bankrupt and being in the possession of the bankrupt it is monstrous that the landlord or anybody else should take possession of them and call on the trustee to prove his title. If such a thing were to be allowed the expense would be enormously increased, and the trustee might in many cases be unable to do so. The bankrupt is in possession and the trustee is entitled to the rights which he had until someone else can prove his better title. Mr. Gordon had no right to refuse to give these things up.

At the same time I cannot approve of the conduct of the trustee in this matter. He had no right to give the undertaking and obtain the key on the strength of it and then withdraw the undertaking after obtaining the key. The proper course, if the goods were not given up, was to come to the Court. The trustee must not take the law into his own hands and he had no right to get possession of the property by such a trick as this. Under the circumstances the motion asking that the papers may be given up must be granted. The other motion of the applicant must be refused. The motion of the trustee requiring the revolver to be given up must be granted and the proper order will be that both parties should pay their own costs and that the trustee must pay his own costs out of his own pocket.

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Herbert Reed:

I venture very respectfully to ask your Lordship to allow the trustee to take his costs out of the estate if there is any.

CAVE, J.:

No, he must pay them himself. Trustees must understand that it is not because they are trustees and have a right to bring motions and initiate proceedings which, if properly brought, will be paid for out of the assets of the estate, that they are recklessly to institute litigation either by bringing motions or by leading other persons to bring motions. Where the trustee has shown such carelessness and want of sense in a case in which, if he had exercised common sense, it would probably have saved litigation, I shall certainly make him pay the costs out of his own pocket.

Order accordingly.

Solicitors : *H. P. Richards*, for the applicant.

Jackson W. Smart, for the trustee.

PRACTICE.

October 31st.

On this date His Lordship Mr. Justice CAVE gave the following direction with reference to cases in which an arrangement is come to after notice of motion has been given.

CAVE, J.:

With regard to cases in which notice of motion has been given, and afterwards an arrangement has been come to, such arrangement must in future be submitted to the Registrar to whom the case is attached, and on his approval of the terms of settlement the order may be drawn up at once without coming to me.

PRACTICE.

IN RE GEE, EX PARTE THE BOARD OF TRADE.

BEFORE
MR. JUSTICE
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1889.

Bankruptcy Act, 1883, section 55.

*Disclaimer of Lease—Onerous Covenants—Assignment of whole term by way of
Mortgage—Bankruptcy of lessee—Liability of trustee.* November 1st.

Where the owner of leasehold premises burdened with onerous covenants assigns such premises by way of mortgage for the whole of the residue of the term granted by the lease and subsequently becomes bankrupt, the equity of redemption which vests in the trustee appointed in the bankruptcy is not property burdened with onerous covenants within the meaning of section 55 of the Bankruptcy Act, 1883, so as to render it necessary for the trustee to apply to the Court for leave to disclaim the lease.

THIS was a Special Case stated by the Judge of the Birmingham County Court for the opinion of the High Court in the following form :—

“ 1. On January 4th, 1889, the above-named debtor presented a bankruptcy petition in the above-named County Court and a receiving order was on the same day made against the debtor.

“ 2. On January 16th, 1889, the said debtor was adjudicated a bankrupt, and on January 18th, 1889, an order of the said County Court for the summary administration of the bankrupt's estate was made whereby Mr. Luke Jesson Sharp, the official receiver of the district of the said Court, became trustee of the bankrupt's property.

“ 3. The bankrupt was a builder.

“ 4. By an indenture dated September 20th, 1886, made between one William Crowson as lessor, and the bankrupt as lessee, the said lessor demised to the bankrupt, his executors, administrators and assigns a piece of land in the parish of Handsworth, fronting two roads called Stamford Road and Crompton Road, for a term of 99 years from September 29th next at a ground rent of £17 payable quarterly.

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" 5. In the said indenture were contained covenants by the lessee to pay the ground rent, to pay all rates, taxes, and outgoings chargeable upon the demised premises, to build on the demised land six houses according to plans and specifications to be approved by the lessor and to cost at least £900, to construct drains for the intended buildings, and to paint and keep in repair the houses and premises when built, and to yield up the buildings or premises in good repair to the lessor at the end of the term.

" 6. In the said indenture there were also covenants by the lessee to insure and to repair after notice and negative covenants not to permit the premises to be used in a manner forbidden by the said indenture.

" 7. By an indenture dated July 27th, 1887, made between the bankrupt and the said *William Crowson*, reciting amongst other things the said indenture of September 20th, 1886, and also reciting, as was the fact, that the bankrupt had built on the demised land six houses, five of which were occupied and one of which was unlet, and that there was due to the said *William Crowson* from the bankrupt a sum of £810 for advances and interest on such advances, the bankrupt assigned to the said *William Crowson* the said demised land with the buildings then erected or thereafter to be erected thereon, for the whole of the residue of the term of 99 years created by the indenture of September 20th, 1886, subject to a proviso for the redemption of the said premises by the bankrupt on payment to the said *William Crowson* of the sum of £810 and interest thereon at the rate of five guineas per cent. per annum on January 25th, 1888.

" 8. The equity of redemption in the demised premises is of no value and the bankrupt's estate is without any assets.

" 9. On June 28th, 1889, the official receiver as trustee of the bankrupt's property pursuant to section 89 of the Bankruptcy Act, 1888, and to Rules 323 and 333 of the Bankruptcy Rules, 1886, applied to the Court for its directions as to whether it is, in the circumstances of the case, necessary in order to free the bankrupt's estate and the trustee thereof from all liability under the said indenture of September 20th, 1886, for the said official receiver as such trustee to apply for leave to disclaim the said equity of redemption and his interest in the demised property. For the

purpose of obtaining leave to disclaim such equity of redemption and interest it would be necessary to incur the expense of an application to the Court and for the official receiver to give notice to the said *William Crowson*.

"The question of law which arises upon the said application is :—

"Whether the interest which the bankrupt had in the demised premises at the commencement of the bankruptcy consists of land burdened with onerous covenants, or binding the possessor thereof to the performance of any onerous acts or to the payment of any sum of money, within the meaning of section 55 of the Bankruptcy Act, 1883 ; and such question being one which may frequently arise, it is desirable to have it determined in the first instance in the High Court of Justice.

"If in the opinion of the High Court of Justice the said interest of the bankrupt in the demised premises does consist of land burdened with onerous covenants or binding the possessor thereof to the performance of onerous acts or the payment of money within the meaning of the said section, directions will be given to the said official receiver to apply for the leave of the said County Court to disclaim the said interest on notice to the said *William Crowson*.

"If the High Court of Justice shall be of the contrary opinion, it will be unnecessary to give any directions to the said applicant."

Muir Mackenzie : for the Board of Trade, stated the case.

The question raised is of considerable importance in cases of summary administration where there are no assets, in which if it is necessary for the official receiver to apply for leave to disclaim, each application necessitates expense which must come from the public purse. By section 55 power to disclaim is given to the trustee when the property consists of lands burdened with onerous covenants. In a case in which the lease has been mortgaged leave to disclaim must be applied for, and there must be notice to the mortgagee. Here there was an assignment for the whole term, and there are no affirmative covenants left to the trustee. I submit that there is no necessity to apply for leave to disclaim. The whole liability to perform the covenants is vested in the assignee. The liability of the bankrupt on his personal covenants

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does not devolve on the trustee but becomes a provable debt, and the covenants which run with the land pass to the assignee. (Counsel referred to *Titterton v. Cooper*, L. R. 9 Q. B. D. 478 : 51 L. J. Q. B. 472 : 46 L. T. 870 : 30 W. R. 866 : *Wilson v. Wallani*, L. R. 5 Ex. Div. 155 : 49 L. J. Ex. 487 : 42 L. T. 875 : 28 W. R. 597 : *Mayor of Carlisle v. Blamire*, 8 East, 487 : Coote on Mortgage, p. 265 : *Collyer v. Isaacs*, L. R. 19 Ch. Div. 842 : 51 L. J. Ch. 14 : 45 L. T. 567 : 30 W. R. 70 : *Morgan v. Hardy*, L. R. 18 Q. B. D. 646 : 56 L. J. Q. B. 363 : 35 W. R. 588 : *Cox v. Bishop*, 26 L. J. Ch. 389 : *Moore v. Greg*, 2 Phil. 717 : *Haywood v. Brunswick Building Society*, L. R. 8 Q. B. D. 403 : 51 L. J. Q. B. 73 : 45 L. T. 699 : 30 W. R. 299.)

CAVE, J.:

Judgment. I think in this case no disclaimer under section 55 is required. The section enacts that "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants," and so on. The question here is whether the bankrupt had amongst his property land burdened with onerous covenants. Now at the time when the lease was executed he undoubtedly had, because he was lessee, and as such, was bound to perform the covenants of the lease, and if he had continued to be lessee up to the time of his bankruptcy, the effect of the bankruptcy would have been that the trustee would have become assignee of the lease, and as such assignee, bound to perform those onerous covenants. It was with the view of enabling the trustee to get rid of the liability in such a case that section 55 was framed. In this case, however, previous to the bankruptcy the bankrupt had assigned the lease. Undoubtedly, in an ordinary case of assignment for value, the assignor after the assignment remains liable on his covenants by virtue of the privity of contract. The assignee is also liable on them by virtue of the privity of estate. It is only on the ground of privity of estate that the trustee would have ever become liable on those covenants, and inasmuch as the previous assignment has transferred the liability to the assignee, leaving on the bankrupt only the liability under the covenant arising out of privity of contract, he ceases to have the land burdened with onerous covenants. It is true that some years ago a question did

arise as to whether in the case of a mortgage the general rule applied. This, however, has been decided in the affirmative some considerable time ago, and it cannot be doubted at this day where there is an assignment to a mortgagee the mortgagee becomes by virtue of the assignment, the owner of the lease burdened with the covenants, and the assignor no longer possesses any land burdened with onerous covenants which can by virtue of the statute become vested in the trustee. It is true that the assignor, where the assignment is by way of mortgage, retains the equity of redemption, but that is a right which is not burdened with onerous covenants. It is not because he is owner of the equity of redemption that he can be compelled to perform the covenants, but solely by virtue of the privity of contract that exists between him and the lessor; that liability cannot be transferred by bankruptcy to the trustee. The right to call for a re-conveyance no doubt is conferred and does pass to the trustee, and if the trustee chooses to exercise that right and have a re-conveyance or re-assignment executed to him, he would then become the owner of the land burdened with onerous covenants. He is not compellable to exercise that right. Therefore the object of the statute which is to free him from a liability which he is compelled to take on himself, cannot apply to the mere case of the transfer to him of the equity of redemption, which is accompanied by no burden unless he chooses to take the burden on himself which he is not compelled to do. I am therefore of opinion that there was in this case no land belonging to the bankrupt within section 55, and consequently that no disclaimer under that section is necessary.

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 IN RE  
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 EX PARTE  
 THE BOARD  
 OF TRADE.

Solicitor : *The Solicitor to the Board of Trade.*



## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE,  
1889.  
—  
November 1st.

### IN RE WAYMAN, EX PARTE THE BOARD OF TRADE.

*Bankruptcy Act, 1883, section 72, sub-sections (1) & (4), and section 73, sub-section (2).*

*Bankruptcy Rules, 1886, Rules 305 & 306.*

*Costs of Solicitor—Appointment of Solicitor as trustee in bankruptcy—Remuneration—“Commission or Percentage.”*

Where a solicitor is appointed trustee in a bankruptcy his remuneration must be in the nature of a commission or percentage ; and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings.

At the first meeting of creditors a solicitor was appointed trustee in the bankruptcy at a remuneration to be fixed by the committee of inspection, and a resolution was subsequently passed by such committee “that the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy.”

Under this resolution the trustee did the legal work arising in connection with the estate and carried in a bill of costs therefor which was allowed by the taxing-master.

*Held :* That the taxing-master was wrong in allowing the costs : that the resolution passed by the committee of inspection was of no effect, and the result was that no remuneration had been voted to the trustee whose proper course was to send in his bill for taxation under section 72, subsection (4) of the Bankruptcy Act, 1883, as if no remuneration had been voted.

**T**HIS was a Review of Taxation required by the Board of Trade under Rule 124 of the Bankruptcy Rules, 1886, and referred to Mr. Justice CAVE by the taxing-master with the consent of all parties.

The case was one of considerable importance to solicitors who may consent to act as trustees in bankruptcy.

The taxation reviewed was that of the costs of Mr. William Peed, a solicitor carrying on business at Cambridge, who had been appointed trustee in the bankruptcy of Ephraim Wayman, such costs

having been allowed on taxation, although a solicitor was not employed by the trustee, on the ground that the trustee was himself a solicitor and therefore entitled to charge professional charges against the estate for any professional work done by him.

On June 1st, 1888, the first meeting of creditors in the bankruptcy was held at which Mr. *Peed* was appointed trustee at a remuneration to be fixed by the committee of inspection.

On August 24th, 1888, the committee of inspection passed the following resolution :—" That the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy."

Under this resolution the trustee did the legal work arising in connection with the estate and carried in a bill of costs therefor.

Objection was taken before the County Court Registrar by the Official Receiver that the resolution was *ultra vires* but the charges were allowed.

The matter was then taken before the Taxing-Master of the High Court on review, and the following objections to the taxation were stated by the Board of Trade :—" The Board of Trade object to the allowance by the said registrar upon the said taxation as aforesaid of the whole of the profit charges contained in the said bill on the ground (1) that the resolution of the committee of inspection of August 24th, 1888, is bad in law and inoperative having regard to section 72, sub-section (1), and section 73, sub-section (2) of the Bankruptcy Act, 1883, and to rules 305 and 306 of the Bankruptcy Rules, 1886 : (2) that the trustee being a solicitor cannot charge the estate for business done in that character in the bankruptcy : (3) that a solicitor trustee is not entitled to charge the trust estate with costs for professional services."

It was held, however, by the Taxing-Master on review that the resolution of the committee of inspection was valid and he allowed the costs, but the question being one of principle it was referred to Mr. Justice CAVE for his decision.

Section 72, sub-section (1) of the Bankruptcy Act provides that "Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or if the creditors so resolve by the com-

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mittee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend."

And by section 73, sub-section (2) it is provided that "Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services."

Rule 305 of the Bankruptcy Rules, 1886, provides that "The creditors, or, as the case may be the committee of inspection, in voting the remuneration of the trustee, shall distinguish between the commission or percentage payable on the amount realised, and the commission or percentage payable on the amount distributed in dividend."

And Rule 306 provides that "Except as provided by the Act or Rules, no trustee shall be entitled to receive out of the estate any remuneration for services rendered to the estate, except the remuneration to which under the Act and Rules he is entitled as trustee."

*Muir Mackenzie* : for the Board of Trade.

The only way in which remuneration can be voted to the trustee is by commission. This resolution instead of providing that the remuneration of the trustee is to be a commission on the amount realised and distributed, and that that remuneration is to cover his professional services, leaves his remuneration a perfectly undefined quantity. The resolution is contrary to the provisions of the Act. It gives the go-by to section 73, sub-section (2). No one can tell from the resolution what the professional services will amount to. The resolution is also a clear violation of Rule 306. The creditors could have passed a resolution for such and such percentage to include professional services. This bill of costs ought to be disallowed on the ground that it is really and truly the bill of costs of a trustee to whom the creditors have improperly voted remuneration.

*Tindal Atkinson* : for the trustee.

If a solicitor trustee is only to be paid by percentage it is difficult

to see why section 78, sub-section (2) was passed at all. When the creditors employ a solicitor trustee they may then contract with that solicitor that he may charge in addition to his percentage his charges as a solicitor. It does not follow that the "remuneration" mentioned in section 78 must be limited to the "remuneration" specified in section 72.

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[CAVE, J.: Assuming that the resolution is a bad resolution it would seem that what the trustee ought to do is to proceed under section 72, sub-section (4) which provides for cases where no remuneration has been voted.]

*Muir Mackenzie:*

In that case the costs would be taxed on a different footing.

CAVE, J.:

It seems to me that this trustee must go and get his costs taxed Judgment under section 72, sub-section (4). The committee of inspection have done here what they have no power to do. Section 72, sub-section (1) is very plain. It says that where the creditors appoint any person to be trustee of a debtor's estate his remuneration "shall be in the nature of a commission or percentage" of which one part shall be payable on the amount realised and the other part on the amount distributed in dividend. Then all that section 78, sub-section (2) says is that "Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services." The result of that would be that the remuneration would be higher than that of an ordinary trustee, but still it must be in the nature of commission or percentage by virtue of section 72. The result is that the resolution in this case is worthless and that no remuneration has been voted to the trustee at all. He must, therefore, send in his bill and have it taxed under section 72, sub-section (4), which provides that "Where no remuneration has been voted to a trustee he shall be allowed out of the bankrupt's estate such proper costs and expenses incurred by him in or about the proceedings of the bankruptcy as the Taxing Officer may allow."

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*Muir Mackenzie :*

On the reference to your Lordship it was made a condition that the Board of Trade should pay the costs of the other side if the Board of Trade failed, but that if the Board of Trade succeeded the costs of the trustee were to come out of the estate, so that the Board of Trade under no circumstances were to ask for any costs from my learned friend's clients, but as your Lordship has decided in favour of the Board of Trade they do not pay the costs.

*Cave, J.:*

No, the costs will come out of the estate.

*Order accordingly.*

Solicitors : *The Solicitor to the Board of Trade*, for the Board of Trade.

*F. & T. Smith & Sons*, agents for *W. Peed*, Cambridge, for the trustee.

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## PRACTICE.

### IN RE RIDGWAY, EX PARTE HURLBATT.

BEFORE  
MR. JUSTICE  
CAVE.  
1889.

*Bankruptcy Act, 1883, sections 57 and 89.*

*Compromise by trustee of claim against estate—Administration of bankrupt's property—Approval of committee of inspection—Refusal of general body of creditors to accept compromise—Application to Court for directions.* November 4th.

A compromise entered into by the trustee in the bankruptcy in respect of a claim made against the bankrupt's estate was approved by a majority of the committee of inspection, but at a subsequent general meeting of the creditors a resolution was passed refusing to accept the compromise.

The trustee applied to the Court for leave to carry out the compromise notwithstanding this resolution.

*Held:* That the resolution refusing to approve the compromise having been passed by the creditors *bona fide* and with a view to their own interests after due consideration of the matter in question, the Court would not overrule their decision: and that the compromise must be abandoned.

**T**HIS was an application by the trustee in the bankruptcy for leave to carry out a compromise which had been entered into with Messrs. *Robinson & Fisher*, the auctioneers, in respect of a certain claim made by them against the bankrupts' estate.

The bankrupts, *A. & T. G. Ridgway*, formerly carried on business at 2, Waterloo Place, as Army and Navy Agents under the style of *Ridgway & Sons*, and they failed for a large amount in the year 1885.

At the date of the receiving order there were secured creditors amounting to 40,000*l.* holding mortgages over freehold and leasehold properties which it was then estimated would realise something like 38,000*l.* in excess of the sum advanced upon them, and an agreement was entered into between Mr. *Price*, who was at first appointed trustee of the bankrupts' estate and Messrs. *Robinson & Fisher*, whereby the latter advanced a sum of 42,000*l.* in order to pay off the secured creditors with interest, taking—as they alleged—as security a charge upon the whole of the assets.

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Mr. Price subsequently died, Mr. Hurlbatt, the present applicant, being appointed trustee in his place, and disputes having arisen with reference to the nature of the security held by Messrs. *Robinson & Fisher*, notice of motion was in January last served by them upon the trustee.

After due consideration of the matter Mr. Hurlbatt came to the conclusion that the claim, which was extremely complicated, was one with regard to which it would be expedient to effect a compromise in order to avoid litigation, and terms having been arranged they were submitted to the committee of inspection who approved them, notwithstanding a strong objection taken by General *Kaye* and Mr. *Smyth*, two members of the committee.

At a subsequent meeting of the creditors, however, a resolution rejecting the compromise was passed, being obtained—as was alleged—by means of proxies which had been sent to General *Kaye* in answer to a circular issued by him.

Mr. Hurlbatt now applied to the Court for leave to carry out the compromise notwithstanding this resolution of the creditors.

*Herbert Reed*: for the trustee.

Mr. Hurlbatt has of course no personal interest in the matter, but he is of opinion that the compromise is desirable. The matter is excessively complicated and litigation should be avoided if possible. Messrs. *Robinson & Fisher* by their motion claim that by agreement with the late trustee they are entitled to have payment in full to make up a deficiency in the security. The motion also asks for an injunction to prevent any dividend being paid, and so the whole proceedings are tied up. The question is whether Messrs. *Robinson & Fisher* only stand in the room of the original mortgagees, but they claim to have a right of consolidation and that it was agreed to give them a covering charge on the assets in case of any deficiency. The trustee thought the compromise a reasonable one, and so did three against two of the members of the committee of inspection, but General *Kaye* and Mr. *Smyth* objected to it because they were of opinion it was too favourable to Messrs. *Robinson & Fisher*, and especially so because it frees them from liability in respect of any negligence in their dealings with the estate. The objectors accuse Messrs. *Robinson & Fisher* of negli-

gence and chiefly in connection with the sale of the Dalacombe Farm in Devonshire, but there is no foundation for that charge. By the compromise Messrs. *Robinson & Fisher* in fact get certain small payments and the equity of redemption of certain properties which the trustee is of opinion are of no value, in return for which they abandon all claims against the estate and all claim to be paid in full. Owing to the action of General *Kaye* and Mr. *Smyth* the compromise was rejected at a general meeting of the creditors, in consequence of which the trustee is compelled to apply to the Court for leave to carry the compromise through. If the Court thinks fit it is not bound in any way by the resolution of the creditors and can give the necessary leave. In the case of *Ex parte Cocks, In re Poole* (L. R. 21 Ch. Div. 397 ; 52 L. J. Ch. 63 ; 47 L. T. 496 ; 31 W. R. 105) it was clearly laid down that "the Court has power for just cause shown to direct the trustee to disregard the directions of the creditors and to act contrary to them." The Court has full power to do what it thinks best for the estate, and Mr. *Hurlbatt* is only desirous that what is best should be done.

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*Sidney Woolf*: for the objecting creditors.

General *Kaye* and Mr. *Smyth* are not committeemen who merely wish to cause a disturbance. Their only desire is to do their duty, and they object to this compromise because they honestly think that by it Messrs. *Robinson & Fisher* are getting more than they are entitled to and are also being released from any liability for negligence. It is true that the committee of inspection by three to two approved the compromise, but the creditors generally disapproved it and the Court will not interfere with their decision. The case of *Ex parte Cocks, In re Poole* (L. R. 21 Ch. Div. 397 ; 52 L. J. Ch. 63 ; 47 L. T. 496 ; 31 W. R. 105) is distinguishable. There the creditors were not acting *bond fide* and for the best. It must be made out before the Court will interfere that the creditors have in some manner failed in the duties imposed on them and have acted improperly.

*Whinney*: for Messrs. *Robinson & Fisher*, did not address the Court.

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Judgment.

## CAVE, J.:

I am of opinion that the leave applied for by the trustee should not be granted. According to the provisions of the Bankruptcy Act the trustee has power with the permission of the committee of inspection to make a compromise, but then section 89 provides by sub-section (1) that "the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection." By sub-section (2) "The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or whenever requested in writing to do so by one-fourth in value of the creditors." Then sub-section (3) provides that "The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy."

Now in this case the compromise which the trustee proposes to enter into has received the sanction of the committee of inspection, but on the matter being submitted to a general meeting of the creditors, the majority of those creditors were opposed to this compromise, and under these circumstances the trustee comes and asks me, notwithstanding the resolution of the creditors, to let him enter into this compromise. No doubt the Court has power to entertain this question, but by what considerations it should be guided in dealing with such an application is not so plain. In the case referred to (*Ex parte Cocks, In re Poole*; L. R. 21 Ch. Div. 397) the Court did disregard the resolution of the general meeting of the creditors, and it disregarded that resolution on the ground that it was passed to favour the debtors and not in the interests of the creditors themselves. In this case it is admitted that no improper motive can be imputed to these creditors who have refused the compromise, but it is said that I ought to overrule their decision on the ground that the compromise is so manifestly

beneficial to the estate that the wishes of the majority ought to give way to the wishes of the minority. If I should come to that conclusion, I should really be coming to the conclusion that the creditors had not acted *bonâ fide* when in fact it is admitted that they did so act. They are men of business and understand the business with which they are dealing, and it is a strong thing to ask me to overrule their decision as to the mode in which this business shall be carried out when it is admitted that the decision has been arrived at *bonâ fide*. I do not say that in a case where it could be shown that the decision was clearly wrong, and also it is difficult to see how any such decision could possibly have been arrived at if everything was *bonâ fide*, the Court would not interfere. But the resolution here is clearly not that. There is perhaps something to be said on both sides. I give the trustee credit for believing that the compromise he wishes to carry out is best for the creditors. On the other hand I must give credit to the creditors for believing their opinion is the right one. That being so and having no ground for thinking that the creditors have not honestly and *bonâ fide* striven to understand the matter and had their own interests in view, I think I should do wrong if I were to overrule their own decision in their own matter merely on the ground that the result they anticipate may not be realised and may not be so beneficial as they think it will be. In my opinion that was not the intention with which the Legislature gave the Court the power which it is now asked to exercise. I think, therefore, that this compromise ought to be abandoned. The application of the trustee must be refused. He may in this case take his costs out of the estate, but I may say this, that when in the future a trustee comes to the Court in such a matter as this unless he has a better case than the present one he will run the risk of having to pay the costs out of his own pocket.

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*Application refused.*

Solicitors : *Girdlestone & Co.*, for the trustee.

*G. E. Carpenter*, for the opposing creditors.

*Lyne & Holman*, for Messrs. Robinson & Fisher.

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.,  
LOPES, L.J.  
1889.  
November 8th.

## PRACTICE.

### IN RE HECQUARD, EX PARTE HECQUARD.

*Bankruptcy Act, 1883, section 6, sub-section 1 (d).*

*Bankruptcy of Foreigner—Domiciled Frenchman temporarily in England—Dwelling-house of debtor—Debtor having only one creditor.*

The debtor who was a domiciled Frenchman living in Paris came over to England for the purpose of carrying on an action instituted by him in the Chancery Division of the High Court, and took five furnished rooms at 32, Piccadilly Circus.

These rooms were some on the second and some on the third floor of the house, the debtor having the exclusive use of them, and he took them for a month at first and twice renewed the tenancy for a similar period.

The debtor brought his wife and a French servant to the rooms and he also engaged in his service a boy who had been employed by the former occupant from whom the debtor took them.

*Held:* (1) That the debtor had had "a dwelling-house in England" within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act, 1883, and that a bankruptcy petition could be presented against him.

(2) That the fact that the debtor had no other creditor in England would not necessarily be a sufficient reason for refusing to make a receiving order; that it is not the duty of the petitioning creditor to prove the existence of other creditors; and that the mere fact that a debtor states he has only one creditor is not sufficient to cause the registrar to dismiss the petition.

**T**HIS was an Appeal on behalf of the debtor from a receiving order which had been made against him by Mr. Registrar Hazlitt.

The debtor, *C. Hecquard*, was a domiciled Frenchman who resided in Paris, and in November, 1886, judgment was obtained against him in France by one *Baird* upon a bill of exchange of which he was the acceptor. This judgment was not satisfied.

On March 18th, 1889, the debtor commenced an action against *Baird* in the Chancery Division of the High Court of Justice for the specific performance of an agreement with reference to a concession of certain ruby mines in Burmah, and for the purpose of carrying on that action the debtor came over to London, staying first at the Hotel Continental for a few days, and then taking five furnished rooms at 32, Piccadilly Circus.

These rooms were some on the second and some on the third floor of the house, the debtor having the exclusive use of them, and he took them for a month at first and twice renewed the tenancy for a similar period, after which he returned to Paris.

The debtor brought with him to England a lady stated to be his wife, and a French servant, and he also engaged a boy who had been formerly employed by the person from whom he took the rooms, and by whom they had been previously occupied. During the three months that he continued in England, the debtor occasionally went to France where his family remained.

On April 26th, 1889, an action was commenced by *Baird* against the debtor in the Queen's Bench Division upon the French judgment, and on June 6th, 1889, he obtained judgment by default.

The judgment was not satisfied, and on June 26th, 1889, a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was issued by *Baird* against the debtor, which was served upon him under an order for substituted service.

The debtor did not comply with the terms of this notice and a bankruptcy petition was presented against him, to which three objections were taken:—(1) that the debtor had not within a year before the date of the presentation of the petition “ordinarily resided or had a dwelling-house in England” within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act, 1883: (2) that the debtor had no creditors other than *Baird* and had no assets in England: and (3) that the bankruptcy proceedings were taken for the purpose of stopping the Chancery action, and were an abuse of the process of the Court, and that even if the petition were not dismissed, the proceedings under it ought to be stayed until after the decision of the Chancery action.

A receiving order was, however, made by the registrar, and from that order the debtor now appealed.

*Sidney Woolf (Ringwood with him)* : for the debtor.

The debtor is a Frenchman residing in France with his family, and admittedly domiciled in France. By section 6, sub-section (1) of the Bankruptcy Act, 1883, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless:—(d) the debtor is domiciled in England, or, within a year before the

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1889. date of the presentation of the petition, has ordinarily resided or  
IN RE had a dwelling-house or place of business in England." The  
HECQUARD, registrar appears to have been of opinion that this debtor had  
EX PARTE HECQUARD. ordinarily resided in England within the meaning of the section,  
for he said in his judgment:—"This gentleman was not here for  
a day or two only, but he was here for three months. The  
petitioning creditor was a judgment creditor. I cannot help  
thinking that the terms 'ordinarily resided' can be applied to an  
almost continuous three months' residence in England." The  
registrar was clearly wrong in that.

[LOPES, L.J.: The words are "has ordinarily resided or had a  
dwelling-house." Do you contend that the word "ordinarily"  
applies to the dwelling-house?] ]

I do not say that, and it is not necessary for me to do so. The term "dwelling-house" in the section must be strictly construed. It must be a separate dwelling-house. All that this man was, was a lodger and nothing else. His dwelling-house was in Paris where his children were, and where he has occupied the same house for three years. He came over and took the rooms solely on account of the litigation he had instituted and in order that he might instruct his solicitors. He only took the rooms for a month, but the litigation continuing he continued the apartments during April and May for a month at a time. The petitioning creditor has got security for costs in the Chancery action from the debtor, he being a foreigner, and in making the application for security, the petitioning creditor stated that the debtor was resident in France. (Counsel referred to *In re Norris, Ex parte Reynolds*, see *ante*, Vol. V. p. 111.) Then as to the second point it is clear that this creditor is the only creditor and that there are no assets in England. The Court ought not in such a case to make a receiving order.

[THE MASTER OF THE ROLLS: Do you say that a petitioning creditor is bound as a condition precedent to prove that there are other creditors?] ]

No, I do not say that. This question has been before the

Court before. In *In re Bullen, Ex parte Arnaud* (see *ante*, Vol. V. p. 248), a question arose as to whether a debtor who has only one creditor is entitled to file his own petition, but the Court did not decide the point, and also in *In re French, Ex parte French* (see *ante*, p. 258.) However, turning to the third point, in any event there was "sufficient cause" within the meaning of section 7, sub-section (3) for the registrar to dismiss this petition, or to stay the proceedings under section 109. The effect and intention of the proceedings is to stop the Chancery action.

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*Herbert Reed*: for the petitioning creditor.

The place which this debtor took was a flat of six rooms. They were kept exclusively for him and he had his own servants. He had a dwelling-house clearly. (Counsel referred to *Ex parte Williams, In re Williams*, L. R. 8 Ch. App. 690; 42 L. J. Bank. 28; 28 L. T. 488; 21 W. R. 451). Then as to the second point there is no evidence at all that there are no other creditors here. Until there have been gazette notices no one can tell how many creditors there are and until the proceedings have commenced no one can say what property there is.

#### THE MASTER OF THE ROLLS (LORD ESHER).

The question in this case is whether this French person was liable to the Bankruptcy laws of this country and whether the circumstances justified the registrar in making a receiving order against him. He was a French subject and was not domiciled in England. You must get him into such a position that the English law applies to him. That depends on section 6 of the Bankruptcy Act, 1883. The present case comes within sub-section 1 (d) of that section which provides that a creditor shall not be entitled to present a bankruptcy petition unless "the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." It is clear that the time during which each of those things may have happened need not be the whole year. The words are "within a year." If within a year the debtor has had a dwelling-house, no time is limited as to how long

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he must have had it. It is not necessary that he should have had it for any particular period of time. If he has had a dwelling-house he is not a mere passer through England and is liable to the bankruptcy laws. What a dwelling-house is, is not stated in the Act of Parliament. The question is whether this person has had a dwelling-house. What happened was this. He certainly was not a mere passer through like an American or other foreigner who might come to see the sights of London and go away again. He was coming here and he took—What? He was not a person living at an hotel under the ordinary circumstances of a voyager who has the rooms for himself of course while he is there but if he goes away for a night the hotel-keeper may put someone else into them if he likes. This man takes five rooms in a house which really belongs to the Great Northern Railway Company—that is the building does. In that building the agent of the Great Northern Railway Company lives, and there must have been a common stair, I suppose, but the agent does not say that he could lock the outer door and keep the key or anything of that kind. A Mr. Mayhew had taken six rooms in the building and furnished them. He took the rooms empty and furnished them. He had the exclusive use of them and they had entrances from the staircase. The rooms were on two floors and out of the six rooms Mr. Mayhew kept one room which he entered from the staircase. He let five of the rooms to the debtor and he made no reservation of any right to shut out the debtor from these five rooms and no servant of Mr. Mayhew's was at liberty to go into them. It was said that the debtor was a lodger, but there is nothing at all to show that. He was the tenant of Mayhew. He had the exclusive use of the rooms, and they were at his absolute command to go in or out as he pleased. That makes them a house. The debtor lived in them; he brought a lady who was his wife and a servant to them, and he had absolute command to go in and out and do what he liked with them. There is no limit of time as to which it is necessary to stay in a house to make it a dwelling-house, and if a person does such a definite act as to take a dwelling-house he may be made bankrupt.

Now let us consider the second objection. There was a judgment against this debtor in France, and the judgment creditor was an

Englishman. The Frenchman remained in France and the Englishman cannot realise his debt in France. But after two years the Frenchman comes to England and the Englishman then attempts to realise his debt. He issues a writ and attempts to obtain judgment on that judgment. There was no answer to the Englishman's claim and he had judgment. He is, therefore, a judgment creditor in England. His judgment debtor is subject to the bankruptcy law and a bankruptcy notice is issued. That being served on him he does not pay. His business takes him away to France. The petition is presented and it is then said that the petition presented by this judgment creditor ought to be dismissed because that English creditor is the only creditor. It might be true to say that it was the only creditor made known to the registrar. But is that fact sufficient to call on the registrar to dismiss the petition? I am of opinion that it is not. Even if he were the only creditor I should say that it was not necessarily sufficient to cause the registrar to dismiss the petition. There might be good reason to make a man a bankrupt even if he had only one creditor. As Lord Justice LINDLEY has said before and has suggested again to-day, there might be assets which it was only possible to collect by that means. But it is by no means clear that because only one creditor appears to be before the registrar that there is only one creditor. The petitioning creditor has not to prove that there are other creditors. When a receiving order is made and the proceedings are published other creditors come forward. It is not clear here that there are not other creditors. It is not for the petitioning creditor to prove that there are other creditors and the mere fact that the debtor says there is only one creditor is not sufficient to cause the registrar to dismiss the petition. It was said also that there were no assets in England, but that assertion cannot be inquired into then. It is not the time for inquiry into the question of assets.

The third objection which was raised on behalf of this debtor is still more difficult to sustain. There was a judgment debt in England for a debt two years old in France, but the debtor brought an action against the creditor. If it could be shown that the bankruptcy law has been put in force in order to stop a favourable action it might be an abuse of the bankruptcy law. But here the

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HECQUARD. petitioning creditor has an honest cause to set in motion the bankruptcy law. He has an honest occasion in which he may put the bankruptcy law in motion and having that honest reason why should we conclude that he did it with a dishonest motive? If he had an honest motive why should the existence of an action which I must say appears to me to be of a most shadowy description prevent him from doing so? In my opinion the appeal ought to be dismissed.

LINDLEY, L. J.:

I am of the same opinion. The only point of difficulty in the case is that arising under the words "ordinarily resided or had a dwelling-house." This man took five furnished rooms and lived there for three months with his wife and servant. A dwelling-house need not be self-contained nor need it be on a vertical plane as distinguished from a horizontal. Five rooms of which a man has exclusive possession can be called a dwelling-house within the meaning of the Act. The other points in the case are easy. With regard to the suggestion that there is only one creditor and no assets in England, it may be that in a case where that is so the one creditor may be abusing the process of the Court and if that is so the bankruptcy proceedings ought not to go on. But it is quite a different thing to say that by reason of the fact that there is only one creditor there shall be no proceedings in bankruptcy. It is possible to unravel matters in bankruptcy which cannot be unravelled in any other way. Then it was said that the bankruptcy proceedings were taken to prevent the debtor from proceeding with an action of his own. That allegation has, in my opinion, not been proved. It seems to me that the object of the petitioning creditor is to get his money and not to stop the Chancery action.

LOPES, L.J.:

The first question is, Had this debtor a dwelling-house in England? He was not an ordinary passer through London. He took rooms and lived in them for three months. He engaged servants and brought his wife to them. It was contended that the proper construction of the word dwelling-house is an entire house. I cannot agree to that. If it were so it would render the pro-

visions of the Bankruptcy Act without avail. I am of opinion that this debtor had a dwelling-house in England within the meaning of section 6, sub-section 1 (d). As to the further point it was said that the proceedings ought to be stayed because the debtor had an action against the creditor. It seems to me that that is a matter for the registrar's discretion, and I think the registrar thought, as I should have thought if I had been sitting in his place. I do not believe that the action for judgment brought here was brought for the purpose of stopping the Chancery proceedings. Then it was said that there is only one creditor and no assets in England. But it was practically admitted that that would not oust the jurisdiction of the Court of Bankruptcy, and it was not necessarily a sufficient reason for refusing to make a receiving order. It would be a matter of discretion for the registrar as to what he should do, and I expect that the registrar was not satisfied that there was only one creditor.

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*Appeal dismissed.*

Solicitors : *Lumley & Lumley*, for the debtor.

*Smiles, Binyon & Ollard*, for the petitioning creditor.



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COURT.

BEFORE  
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AND  
CHARLES, J.  
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\_\_\_\_\_  
November 11th.

**IN RE DUCE & DUCE, EX PARTE JAMES DUCE.**

*Bankruptcy Act, 1883, section 28.*

*Discharge—Absolute Refusal—Continuing to trade after knowledge of insolvency—Contracting debts without reasonable ground of expectation of being able to pay them—Fraud in Establishment of Limited Company.*

In June, 1887, from a statement prepared by the brother of the bankrupt with whom he was trading in partnership it appeared that during the two previous years they had incurred a loss of 1199*l.*, and they were advised by their solicitor that the proper course was to call their creditors together.

On the suggestion of another solicitor, however, the books of the firm were handed over to an accountant nominated by him who drew up a balance sheet showing an average net profit of 12 per cent. for three years, and a prospectus was thereupon issued founded on the accountant's report, the business being converted into a limited liability company.

After carrying on business for three months the company went into liquidation and the brothers were shortly afterwards adjudicated bankrupt.

The County Court judge absolutely refused the bankrupt his discharge.

*Held:* That the bankrupt must have known that the prospectus in which he joined was totally false ; that by putting forward statements in the prospectus which he knew to be untrue he was guilty of fraud ; and that the County Court Judge was fully justified in absolutely refusing his discharge.

Per CHARLES, J. :—That even if the bankrupt was not fully aware of the true state of affairs he had under the circumstances placed himself in the position of a person who was guilty of fraud, in that he had made himself a party to the issuing of a prospectus for the purpose of obtaining money being utterly regardless whether the statements contained in it were true or not.

**T**HIS was an Appeal on behalf of the bankrupt *James Duce* from an order of the judge of the Walsall County Court by which he absolutely refused the said bankrupt his discharge.

The case afforded a salutary warning to those traders who, while their affairs are in an unsatisfactory condition, attempt to secure their own advantage by turning their business into a limited liability company.

Prior to the year 1878 the bankrupt's father, *J. T. Duce*, carried on business as a wine and spirit merchant, and afterwards

as a brewer at Wednesbury, in Staffordshire, and in that year he took his eldest son, *John Duce*, into partnership, the business being thereafter known by the style of *J. T. Duce & Sons*.

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On June 30th, 1885, the father retired from the business, and *John Duce* and his brother, the present appellant, *James Duce*, entered into partnership and carried on the business under the same style. No account was made out when the father retired, but the sons agreed to pay him 13,000*l.*, by instalments of 100*l.* a month, or 1,200*l.* a year, for which they gave him promissory notes. The father assigned the property and assets of the business to the sons, and they took over the liabilities. The sum of 1,200*l.* a year was duly paid to the father up to his death in November, 1886, and a reduced sum of 1,000*l.* a year was afterwards continued to the mother up to the end of 1887.

No regular balance sheets appear to have been made up by the brothers, but in June, 1887, *John Duce* proceeded to get out a statement with a view of ascertaining the position in which they then stood, and by November, 1887, he had prepared a balance sheet up to June 30th, 1887, from which it appeared that during the two previous years they had incurred a loss of 1,199*l.*

In consequence of this the brothers consulted Mr. *Thursfield*, their family solicitor, who advised them that they ought to call their creditors together, but instead of doing so, they went to Mr. *J. Smith*, another solicitor, by whom it was suggested that they should hand over their books to Messrs. *Lewis & Attley*, a firm of accountants in Birmingham, for them to look into with the view if possible of forming a limited liability company of the business.

Accordingly, by January, 1888, a balance sheet was prepared by Messrs. *Lewis & Attley*, which shewed gross profits of 15,000*l.* for the three previous years, or an average net profit of 12 per cent., the alleged profits being, in 1885, 3,893*l.* : in 1886, 5,445*l.* : and in 1887, 5,776*l.*

A prospectus was issued founded on this report, and the business converted into a company called *J. T. Duce & Sons, Limited*, the company agreeing to pay 33,000*l.* for the property, stock and general assets, 22,000*l.* in shares, and 11,000*l.* by instalments, 3,000*l.* in one month, 5,000*l.* in three months, and the remainder in four months.

1889. In July, 1888, however, after carrying on business for a little  
 over three months, the company went into liquidation, and in  
 DUCES & DUCES, September, 1888, John and James Duce were adjudicated bank-  
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 JAMES DUCE, rupt.

In May, 1889, James Duce applied to the County Court for his discharge, when the official receiver reported four offences against the bankrupt under section 28 of the Bankruptcy Act, 1883, viz. :— (1) that he had continued to trade after knowing himself to be insolvent: (2) that he had contracted debts without reasonable or probable ground of expectation of being able to pay them: (3) that he had been guilty of a fraud in the establishment of the limited company: and (4) that he had filed a false defence.

The bankrupt was exonerated from the last charge, but the County Court judge held that it was proved he had committed the other three offences, and he absolutely refused him any order of discharge.

From that refusal the bankrupt, *James Duce*, now appealed.

*Sidney Woolf*: for the bankrupt.

As to the first two charges the evidence is clear that the bankrupt did not know his position. No business was really done after November, 1887, and the bankrupt says that he did not know he was insolvent. He thought the company would pay, and it was not until June, 1888, when the company failed, that he knew his position. The third charge about being guilty of fraud in the establishment of the company is a very serious one to make, and there is no evidence to support the finding of the official receiver. It was natural that the bankrupt should adopt the advice of the solicitor he consulted, Mr. J. Smith. He said that the account which *John Duce* had drawn up was altogether imperfect, and could hardly be called a balance sheet at all, and he advised the bankrupts to go to Messrs. *Lewis & Attley*. Reports were got, and it was on the faith of those reports that the company was formed. No statement in the prospectus was not borne out by the reports. To find a man guilty of fraud on such evidence as this is a very strong measure indeed. The business of this bankrupt in the firm was to act as traveller, and under the circumstances it is wrong to visit on him the heaviest possible penalty under the section.

[CAVE, J.: You have to meet this difficulty that in the face of a loss of about 1,200*l.* in two years, the bankrupt represented that a 12 per cent. profit was made.]

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The first balance sheet prepared by *John Duce* was really no balance sheet at all. By the advice of a solicitor a proper balance sheet was got out by a proper person, and relying on that report and on those accounts, the bankrupt consented to the bringing out of the company. A man in such circumstances cannot do anything else than employ a solicitor, who employs a respectable accountant, and in this prospectus there is not a word which is not borne out by the report of Messrs. *Lewis & Attley* and of Mr. *Brewitt* who surveyed the premises. But even if some of those facts are inaccurate, the fault ought not to be visited on the bankrupt. The question is whether he believed them, and the fact that the company has gone into liquidation is no reason to visit him with such a heavy penalty. His own private debts were only 48*l.*, and in any event the County Court judge ought only to have suspended the discharge for a time, and he ought not to have refused it altogether. In *Derry v. Peek* (38 W. R. 88) it was laid down that "In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

*Sir Edward Clarke, Q.C., Solicitor-General (Muir Mackenzie with him) : for the Board of Trade.*

What the report of the official receiver states is that "the statements contained in the prospectus as to the position of the bankrupt's firm and the profits made by them were untrue to the knowledge of the bankrupt, who knew that the firm was insolvent at the time this prospectus was issued, and that he and his brother had traded at a loss for two years. He also knew that the statements as to the assets and liabilities in the balance sheet prepared for the purpose of floating the company were untrue." The bankrupt had access to all the books and went through them, and he knew the actual position of the firm. These people made them-

1889. selves responsible for the prospectus. *John* was to have 250*l.* a

IN RE  
DUCE & DUCE, year as managing director, and *James* 250*l.* a year as secretary.  
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JAMES DUCE. The prospectus also speaks of "the continued and increasing prosperity of the firm evidenced by the report of Messrs. *Lewis & Attley*," and of the 12 per cent. profit. That report is a wonderful document, and the accounts are a curiosity in account-making. The balance sheet for 1886 introduces as assets the drawing of the partners in order to create an equilibrium which gives an imaginary profit of 800*l.* The liabilities were set down as 80,507*l.*, and the assets, after manipulation, at 29,681*l.* without the drawings. That was after every figure on the credit side had been fraudulently altered. The same sort of things occurred in the balance sheet for 1887. I submit that this is a most flagrant case of fraud on the part of a bankrupt, and that the order of the County Court judge was right.

CAVE, J.:

Judgment. I am of opinion that this appeal ought to be dismissed. It seems to me that the County Court judge was fully justified in the decision which he arrived at. Three matters were alleged against this bankrupt in respect of his conduct. With regard to the first two charges, that in June, 1887, he knew that he was insolvent and continued to trade and to contract debts and obtain credit, it is really not necessary to express any definite opinion, because those charges are wholly overshadowed and warped by the third charge which was alleged against him. To my mind there can be absolutely no doubt whatever that these two persons knew perfectly well in, at any rate, November, 1887, that they were utterly insolvent. They consulted a solicitor, who gave them perfectly sound and proper advice which they were bound to follow. In the face of that they went to another solicitor and allowed themselves to be persuaded by him to join in issuing a prospectus which they must have known was totally false. They must have known it to have been so manufactured by the accountants that it did not represent at all accurately the state of things which actually existed at that time. A statement had been got out by *John Duce* up to June 30th, 1887, which in the most favourable view showed an absolute loss of 1,199*l.* on two years' trading. Looking at the fact that very few

bad debts were written off it was safer, even according to John Duce's own admissions, to put down that loss at 2,000*l.*, but at the most favourable view a sum of 1,199*l.* was absolute loss, and that without taking into account a single penny for the drawings of any member of the firm. There was not one farthing of profit, and yet this by the manipulation of the figures by the accountants—manipulation which it is not attempted to justify—is turned by the accountants into a profit of 12 per cent. It was obviously a gross fraud. It is not a mere question of a reckless statement by a man who did not know whether what he stated was true or false, but it is a statement which both John and James Duce must have known was absolutely false, and it was made by them for the purpose of inducing the public at large to take shares in the proposed company in order to put money into their pockets. In my opinion it was a clear case of fraud, and James Duce knew all about it and was a party to it, and the County Court judge was perfectly right in refusing his discharge.

CHARLES, J. :

I am of the same opinion. I had some little doubt upon the evidence whether the first two charges alleged against the bankrupt were fully made out, but it seems to me that that is quite immaterial, because I am quite clear that the third charge was fully made out, and it is by far the most serious one. Gathering the history of the transaction from the whole story of the case, it is impossible to come to the conclusion that James Duce did not know of the gross fraud which was undoubtedly committed. The brother had prepared an honest-enough balance sheet although it might not perhaps be quite a formal one, and that sheet showed that up to June 30th, 1887, there was an actual loss upon the two years' trading of 1,199*l.*, and James Duce knew that. Then he says that he did not understand the accounts, and being told by somebody that the account drawn up by his brother was wrong, he allowed the whole thing to pass away from his control and permitted the issue of this false prospectus. For my own part I must say that it is impossible to think that he was ignorant of the true state of affairs and was so innocent as he professes. But still if he was it seems to me that he is in the position of a person who is

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1889. guilty of fraud. He was a person who for his own advantage has issued for the purpose of getting money from other people a false statement without regard whether it was true or false. There is nothing in *Derry v. Peek* (38 W. R. 83) to prevent the Court holding that to be fraud, as it always would have done. It is a fraudulent act for a man for his own advantage to issue a statement which is false in fact as this was, being utterly careless of whether it was true or not.

*Appeal dismissed.*

Solicitors: *Brownlow & Howe*, agents for *Whitehouse, Wolverhampton*, for the bankrupt.

*The Solicitor to the Board of Trade*, for the Board of Trade.



## PRACTICE.

IN RE LLOYD, EX PARTE LLOYD.

DIVISIONAL  
COURT.

BEFORE  
CAVE, J.,  
AND  
CHARLES, J.  
1889.

*Bankruptcy Act, 1883, section 28.*

*Discharge—Application to review former order—Right of Appeal—Application de novo by bankrupt whose discharge has been refused.*

An application made to the Court by a bankrupt for a review of an order refusing him his discharge ought not to be an *ex parte* application, and it ought to be made and decided upon by the Court before the facts of the case are gone into.

On such application it is necessary that the bankrupt should make out a *prima facie* case which the other side are not required to answer until the Court has determined whether or not it will grant an order for review.

When the Court comes to the conclusion that there are *prima facie* grounds which lead it to think that the former order ought to be reviewed, if the other side are dissatisfied their proper course is to appeal at once from the determination to review the order, and not to wait until the order has been brought up for review before appealing.

*Quare:* Whether where an order of discharge has been refused by reason of the conduct of a bankrupt, such bankrupt may not at a subsequent period again apply for his discharge, if he is able to show that during the years it has been suspended he has displayed qualities the want of which caused his discharge to be refused on the previous occasion.

**T**HIS was an Appeal on behalf of the bankrupt *N. Lloyd*, from an order of the judge of the Manchester County Court, by which he absolutely refused the said bankrupt his discharge.

The petition was presented on March 29th, 1887, the receiving order being made on April 27th, 1887, and on May 19th, 1887, the debtor was adjudicated bankrupt.

On January 13th, 1888, application was made by the said bankrupt for his discharge, on which occasion the official receiver reported that he had made himself liable in respect of four of the offences specified in section 28 of the Bankruptcy Act, 1883, in that (1) he had omitted to keep proper books : (2) that he had continued to trade after knowing himself to be insolvent in and after the month of March, 1887 : (3) that he had contracted debts with-

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out any reasonable or probable grounds of expectation of being able to pay them : and (4) that he had previously made a composition with his creditors.

The County Court judge refused the discharge absolutely, but on April 11th, 1889, a second application was made by the bankrupt for his discharge, which was also refused by the County Court judge on the ground that the matter was *res judicata* and that the order made on January 18th, 1888, being a final order, a second application could not be made, but the learned judge also pointed out that the only course for the bankrupt to adopt was to apply to the Court to review its decision under section 104 of the Bankruptcy Act, 1888.

An application to review and vary the order of January 18th, 1888, was accordingly made and the case was heard on the merits on June 1st, 1889, but the application was dismissed by the County Court judge.

The facts of the case showed that the bankrupt commenced business so long ago as 1836 as a designer for calico works at Manchester.

In 1840 he became a drysalter and carried on business at Manchester as N. Lloyd & Co. In 1858 he sold his share in that business for 25,000*l.* and became partner in a calico printing company, but in 1871 the partners went into liquidation, the creditors being paid a composition of 15*s.* in the pound.

In 1875 the bankrupt opened another printing business at Church in Lancashire and in 1877 the trustees under the will of the owner of the premises in which this business was carried on being obliged to sell them and the bankrupt having laid out a large sum of money on the premises, he became the purchaser, the trustees taking a mortgage to secure the purchase money which was to be paid by instalments.

In 1878 the bankrupt started some bleaching and finishing works also at Church, but in 1882 he handed over the management of the printing business to his nephew, while in 1883 the bleaching and finishing works were taken over by a company under the style of The Star Bleaching Company, limited.

For that business the bankrupt received 5000*l.* in cash and 25,000*l.* in fully paid-up shares.

In November, 1885, the bleaching works were destroyed by fire, which stopped the business, and the company having got into difficulties, in February, 1887, the mortgagees entered and seized, and in March, 1887, the company went into liquidation.

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On March 29th, 1887, a petition was presented against the bankrupt, and he now appealed from the absolute refusal of his discharge as above stated.

*J. Walton*: for the bankrupt.

The report of the official receiver was based on a mistaken view of the facts. The decision of the County Court judge was really founded on this one point, that the bankrupt had borrowed large sums on mortgage on insufficient security and had put himself into the position that the mortgagees could at any moment sweep away his estate, and so he refused the discharge. But that was a very surprising view to take. There is nothing to show that the security was not good for the mortgage debt and there was nothing culpable and reckless in the conduct of the bankrupt. The cause of the failure was the collapse of the Star Bleaching Company. It was a sudden and unexpected collapse which at once made the debtor bankrupt.

*Sidney Woolf*: for the petitioning creditor and the trustee in bankruptcy.

The first question is whether under the circumstances of the case a rehearing of a refusal of the discharge could take place. I submit that the County Court judge had no jurisdiction to rehear if no fresh facts were brought forward.

[*Cave, J.* It is not for you to raise that question now. You should have appealed from the decision of the County Court judge consenting to rehear.]

I will not press the point. On the facts the County Court judge has taken a perfectly correct view. The liabilities of the bankrupt were 19,000*l.* and his assets only 112*l.* The conduct of the bankrupt cannot be defended either in respect of the mortgage on the Foxhill property or in respect of his treating the Star Company

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shares as of their full value. He had created a mortgage the interest of which he could not pay and the mortgagees could at any time come down and sweep the property away.

*Muir Mackenzie*: for the Board of Trade.

The Board of Trade wish to leave the matter in the hands of the Court. They are not anxious to press hardly on this bankrupt.

*CAVE, J.:*

Judgment.

I must confess that for a long time, and until I became aware of what the official receiver said with respect to the bankrupt's continuing to trade after knowing himself to be insolvent in March, 1887, I was under the impression that the bankrupt, during all these years, must have known that the asset in the company was not a good asset. According to what the official receiver has said, however,—and it is quite clear from the shorthand writer's notes that he did say so—the official receiver does not pretend to say that the bankrupt knew he was insolvent until March, 1887. In that case the continuing to trade only lasted over some part of the month of March. The petition was presented on March 29th, 1887, and for some time in that month of March the debtor knew that he could not pay his debts. Now, as I have often said before, if a man knows he is insolvent he ought to call his creditors together, but that takes some little time. A man must have some time to prepare his statement of accounts, and an uncertain period which certainly did not extend longer than twenty-nine days at the most cannot justify us, I think, in saying that because the debtor did not present his petition within that time he carried on his business after knowing himself to be insolvent. The same objection applies to the charge of contracting debts without reasonable ground of expectation of being able to pay them. The debtor failed for 19,000*l.*, and the assets were only 112*l.*: and if he contracted any of those debts knowing that he was hopelessly insolvent, we must, without some very clear explanation of the matter, come to the conclusion that they were contracted without reasonable ground of expectation of his being able to pay them. But all the debts were contracted down to March, 1887, and the official receiver says that the debtor believed himself to be solvent, and if that be so he cannot be said to

have contracted debts without reasonable ground of expectation of being able to pay them. The question really is, Had the debtor reasonable ground for supposing that this asset of 25,000*l.* was a good asset? Whether he did contract these debts with expectation of being able to pay them depends entirely on his belief and whether that belief was a reasonable belief, and when the official receiver says in his report that the bankrupt did believe that this asset was sufficient to pay his creditors, he ought to go further and prove that the belief was an unreasonable one, a thing which in my opinion he has not done. No facts have been brought forward which show that the debtor did not entertain that belief honestly, and the fact that it turned out wrong by no means shows that he had no reasonable ground to entertain it. Then with respect to the charge of not keeping proper books. Undoubtedly the report of the official receiver does state that as an offence, and so long as the report remained uncontradicted the County Court judge was entitled to act on it as he did in January, 1888, but when the County Court judge consented to rehear the case, the bankrupt was entitled to bring evidence to refute the charge. He does so by affidavit and it would really seem that the only thing complained of is that there is no balance sheet, but it was pointed out that different balance sheets were kept which could easily be added together and a full balance sheet so obtained. Finally there is the charge that the debtor had previously made a statutory composition with his creditors which is true, but that was in 1871 and he paid his creditors 15*s.* in the pound, and when that charge stands alone as it does here and under such circumstances I do not think it is sufficient to cause the discharge to be absolutely refused. The discharge has been in effect refused for two years and in my opinion it should now be granted.

I should like to say a few words with reference to what has been said by Mr. Woolf as to the conduct of the learned County Court judge in granting this review. I should rather like to consider the matter before I entirely assent to the view that he cannot entertain the application afresh. I should be disposed to go along with the learned judge to the extent of saying that the application cannot be entertained afresh if it is made simply upon the matter which was present before the learned judge at the time when the application was originally made. But I am by no means satisfied that where an order

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of discharge has been refused by reason of the conduct of a bankrupt, that he may not come at a subsequent period after an interval of some years, if he is able to show that during those years he has displayed qualities the want of which caused his discharge to be refused at the earlier period. A man, for instance, may have his discharge refused because he has kept his books very badly, and has committed other offences against the bankruptcy laws, and at the same time he may afterwards, after the lapse of some years, show that he has learned through the school of adversity, by serving as manager or in other ways, to do that which he had failed to do before, and it may under those circumstances appear right to the Court that he should be restored to that position which the Court was compelled to refuse to restore to him before. I do not desire to decide that point. I only wish it not to be supposed that I think an application cannot be made *de novo* on those grounds. Where, however, as here, the application to the learned judge is founded upon what was or might have been before the learned judge on the original hearing, then undoubtedly it should be an application by way of review and not an application to entertain over again the same facts as were or might have been before him before—an application which he has already heard. The proper course in such a case as that is to ask for a review of the former judgment which was done here. Now that undoubtedly ought not to be an *ex parte* application, and it ought to be an application made and decided upon by the learned judge before the facts are gone into. Of course the party asking for the review will have to give very good reasons why the review should be granted; but it is not necessary that he should do more than make out a *prima facie* case, which it is not necessary for the other side to answer until the court has determined whether there is a *prima facie* case for granting an order for review. No doubt the other side may if they think fit say, "I am able to show that there ought not to be an order for review, and if I do not satisfy you that there ought not to be an order for review, I do not expect to be able to satisfy you that the original order was right." But that is a different matter. When, under ordinary circumstances, the learned judge comes to the conclusion that there are *prima facie* grounds which lead him to think that his first order ought to be reviewed, if the other side are dissatisfied with that

they ought to appeal against his determination to review his order. If they do not do that but wait until the order has been brought up for review, they will run the risk of being out of time in any appeal they may bring, and if they do not give notice that they intend to appeal against the order, they ought not to be heard to appeal against the order made on the review.

Those are all the remarks I desire to make on that part of the case and I only make them for the purpose of preventing any misunderstanding, and that it may not be supposed that I have assented to the view which appears to have been taken by the learned judge upon that part of the case.

CHARLES, J. :

I am of the same opinion. One of the principal charges brought against this bankrupt is that he continued to trade after knowing that he was insolvent in March, 1887. But the petition was presented in March, 1887, and it is shown that all the official receiver meant was that the bankrupt had this knowledge during one month. Under those circumstances I do not think that this charge can be sustained. Then if that charge fails the charge of contracting debts without reasonable ground of expectation of being able to pay them fails with it. I am not satisfied that the bankrupt did not up to March, 1887, believe that he had the valuable asset in his possession.

*Appeal allowed.*

Solicitors : *Cobbett, Wheeler & Cobbett*, for the bankrupt.

*Rowley & Co.*, agents for *Rowley, Page & Rowley*,  
Manchester, for the petitioning creditor and the  
trustee.

*The Solicitor to the Board of Trade*, for the Board  
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## PRACTICE.

DIVISIONAL  
COURT.

BEFORE  
CAVE, J.,  
AND  
CHARLES, J.  
1889.

November 13th.

IN RE SHACKLETON, EX PARTE SHACKLETON.

*Bankruptcy Act, 1883, section 28.*

*Discharge—Condition—Consent to Judgment—Principles by which the Court ought to be guided in imposing such condition.*

In imposing as a condition of granting a bankrupt his discharge that he shall consent to judgment being entered against him for the balance of the provable debts, the Court ought to be careful that it does not place such a burden on the debtor as to do away with all motive for exertion on his part; and unless the Court finds a man in receipt of an income more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise proceeding to grant an order of discharge subject to such a condition.

Where the discharge of the bankrupt, against whom it was alleged that he had continued to trade after knowing himself to be insolvent and that he had brought on his bankruptcy by rash and hazardous speculations, was granted by the County Court judge only on the condition that he should consent to judgment being entered against him for the sum of 403*l.*; and it was shown that the bankrupt was a married man with four children, and that his present earnings only amounted to 150*l.* a year, with no prospect of an increase.

*Held:* That the order made in the County Court ought to be varied; and that a proper order under the circumstances would be that the discharge of the bankrupt be suspended for three years.

**T**HIS was an Appeal on behalf of the bankrupt from an order of the judge of the County Court at Madeley, by which he granted the said bankrupt his discharge only on the condition that he consented to judgment being entered against for the sum of 4,038*l.*

The case raised an important question with reference to the principles by which the Court ought to be guided in imposing as a condition of granting a bankrupt his discharge that he shall consent to judgment being entered against him for the balance of the provable debts under section 28, sub-section (6) of the Bankruptcy Act, 1883.

The bankrupt formerly acted as an assistant to his father, who

carried on business as a linendraper at Madeley, and he was then paid a salary of 3*l.* a week.

In 1886 the bankrupt took over the business of a chemical manufactory which had been previously conducted by his cousin under the style of Jesse Fisher & Co., and he carried on his business until June, 1888, when he became bankrupt, the principal cause of his failure being alleged to be the refusal of the Railway Companies, owing to an explosion which had taken place during transit, to transport certain chemicals especially bisulphide of carbon manufactured by him whereby he lost several valuable contracts.

On application by the bankrupt for his discharge the official receiver reported that he had committed two offences under section 28 of the Bankruptcy Act, 1883, in that (1) he had continued to trade after knowing himself to be insolvent: and (2) that he had brought on his bankruptcy by rash and hazardous speculations.

The County Court judge made the following order, that the discharge should be granted only on the condition that the bankrupt should "consent to judgment being entered against him in the County Court by the official receiver for the sum of 4,08*l.* being the amount of the unsecured debts provable under the bankruptcy unsatisfied at the date of the order, with costs. Upon such consent being given judgment to be entered accordingly, such judgment to remain in force until the creditors who have proved or may hereafter prove their debts in the bankruptcy shall have been paid 5*s.* in the pound upon the amount of such debts together with the unpaid costs. The amount to be paid by annual instalments of 75*l.* until the whole is discharged."

From that order the bankrupt now appealed.

*E. Cooper Willis, Q.C. (Hextall with him) : for the bankrupt.*

I understand that the other side do not intend to support the latter part of this order which deals with the instalments. The latter part of the order is abandoned, and so the matter stands on whether the County Court judge was right in making such an order of discharge striking out the latter part. I admit that this man has traded when he knew that he was insolvent, but he was not guilty of rash and hazardous speculations, and the fact of his so trading only deserved a nominal penalty. The bankrupt and

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his father had advanced money to his cousin before he took over this chemical manufactory, and when the bankrupt did take it over he was told that the business was a good one and only required capital to realise 800*l.* or 1,000*l.* a year. Whatever the bankrupt did he did under good advice, and he entered into the business fairly and honestly. The unforeseen accident of the explosion at a London Railway Station which caused the railway companies to refuse to carry that chemical any longer and so lost the bankrupt several valuable contracts, really caused his insolvency. Even admitting that this bankrupt has been guilty of trading after knowing himself to be insolvent, the idea of putting upon him a judgment to pay 5*s.* in the pound and an unlimited amount of costs is monstrous: Even without the costs it would take him twelve or thirteen years to pay. But beyond this, this is not a case in which judgment ought to be entered at all. The man was perfectly honest in his transactions. He is thirty years of age and is a married man with four children, while his income is now only 150*l.* a year and there is no likelihood of his ever getting more. In the case of *In re Bullen Ex parte Arnaud* (see *ante*, Vol. V. p. 248) Lord Justice LINDLEY said ". . . There is no evidence at all that the man will ever have any after-acquired property and under those circumstances I think *prima facie* one ought not to tie a man up by such a judgment as that under section 28, sub-section (6). It would give rise to great difficulties and possibly litigation. A question is almost sure to arise between the judgment creditor and any new creditors and a man ought not to be placed in such a position unless something is likely to be gained by it." The reason the bankrupt failed was because that owing to the accident which occurred he was prevented from going on with his business. The punishment imposed by the County Court judge is so excessive that it ought not to be upheld, and in any event the case would readily be met by a short suspension.

*Muir Mackenzie*: for the Board of Trade.

The County Court judge had abundant ground for the exercise of his discretion here. Upon the facts the case warranted the order made. There is a very bad case of trading with knowledge of insolvency. This man began to trade in 1886, and he finds

himself in April, 1889, with liabilities 4,080*l.*, and assets only 500*l.* All along the balance sheets shewed a deficiency. In 1886 there was a deficiency of 690*l.* : in 1887 of 1,500*l.* : and in 1888 the deficiency was 2,104*l.* The bankrupt knew all that and he went on trading. But in any case the order is not so highly penal as my friend suggests. Judgment cannot be enforced in such case without leave of the Court. By Rule 244 of the Bankruptcy Rules, 1886, the bankrupt must give the official receiver information with respect to his after-acquired property, and not less than once a year file in the Court a statement shewing the particulars of any property or income he may have acquired subsequent to his discharge. In the case of *In re Clarkson Ex parte Clarkson* (see *ante*, Vol. II. p. 219) your Lordship, Mr. Justice CAVE actually imposed the condition now appealed against.

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[CAVE, J. Yes, under the circumstances of that case. I cannot see here that this bankrupt is likely to get anything except from his own exertions and if you tie a judgment of 4,000*l.* round his neck you destroy all stimulus for exertion.]

The order is not a highly penal one, because the judgment cannot be enforced without leave of the Court.

CAVE, J.:

I am of opinion that the order should be modified. It is always Judgment. a question of difficulty to determine, where a debtor is not entitled to an absolute discharge, whether the order should be suspended and for how long or whether it should be granted subject to a condition in respect of after-acquired property.

In deciding that question the Court ought to have regard to public morality and to the interests of the public generally, and unless the Court finds a man in receipt of an income derived from his earnings or otherwise which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise thing to grant an order subject to a condition affecting after-acquired property. The Court ought to be careful to see that it does not by a condition of that sort do away

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with the motive which a man has for exertion to work in his calling which is a good thing for the public interest generally. If such a burden is put on a man that he can have no hope of bettering his position he will not make the effort, and few men are more easily discouraged than that class of men who become bankrupt. They are easily excited to hope in matters which do not call for corresponding exertion and they are just as easily depressed. If we impose the condition on this debtor that he shall consent to judgment, I am afraid the result might be to discourage him from trying to improve his position and it might even perhaps lead him to evil courses and so make his position worse both for himself and the public.

Under the circumstances of this case, therefore, I do not think it is a case in which such a condition ought to be imposed. I do think, however, that the discharge ought to be suspended. This man has been guilty of continuing to trade after knowing himself to be insolvent. Now as I have said more than once when a man knows that he is insolvent his plain duty is to call his creditors together and leave them to decide whether he shall go on or not. If he does not do that he is really trading at their expense. We ought, also, not to shut our eyes to the whole circumstances of the case and to the rash and reckless manner in which this bankrupt entered into this business of which he knew very little and on which he bestowed but little care and attention. I think the order of discharge ought to be suspended, and suspended for a period of three years from the date of the order of the Court below.

CHARLES, J.:

I am of the same opinion. I have nothing to add.

*Order accordingly.*

Solicitors : *Warriner & Kinch*, agents for *Stone, Derby*, for the bankrupt.

*The Solicitor to the Board of Trade*, for the Board of Trade.

**PRACTICE.****IN RE TREGASKIS, EX PARTE TREGASKIS.***Bankruptcy Act, 1883, section 28 and section 104, sub-section (1).**Discharge—Suspension of Conditional Order—Application for Review—Rehearing.***DIVISIONAL COURT.****BEFORE  
CAVE, J.,  
AND  
CHARLES, J.  
1889.***November 14th.*

On March 18th, 1886, an order was made in the County Court that the discharge of the bankrupt be suspended for three years, and that it be then granted, subject to the condition that he should consent to judgment being entered against him for the balance of the provable debts under section 28, sub-section (6) of the Bankruptcy Act, 1883.

On June 20th, 1889, application was made by the bankrupt to the County Court to review, rescind, or vary its former order by expunging the conditions on which it had been granted, on the ground that the Court had no power under section 28 to make a conditional order of discharge and also suspend the order.

The County Court judge refused the application, being doubtful whether under section 104, sub-section (1), of the Bankruptcy Act, 1883, he had authority to deal with it.

*Held:* That the County Court judge had power to rehear the case, and that it must be remitted back to him for that purpose, and to make such order as he might think fit under all the circumstances.

**T**HIS was an Appeal on behalf of the bankrupt from an order of the judge of the County Court at Truro dismissing an application made by the bankrupt on June 20th, 1889, to review, rescind or vary an order of discharge granted by the County Court on March 18th, 1886.

On October 18th, 1884, the bankrupt, who carried on business as a miller and corn-merchant, filed his own petition and a receiving order was made under which he was adjudicated bankrupt.

On March 18th, 1886, the bankrupt applied for his discharge to his Honour Judge Bere who was at that time the judge of the Truro County Court, when an order was made that the discharge of the bankrupt be suspended for three years, and that it be then granted subject to the condition that he should consent to judgment being entered against him for the balance of any debts provable

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in the bankruptcy, under section 28 sub-section (6) of the Bankruptcy Act, 1883. The bankrupt was also required in every year to render to the official receiver an account of his profits, and to further consent that any sum over 150*l.* should be set aside for the benefit of his creditors until they had been paid 20*s.* in the pound.

The estate subsequently realised nearly 10*s.* in the pound, and on June 14th, 1888, the bankrupt applied to his Honour Judge Morgan Howard, who had succeeded to the office of County Court Judge, that the order of March 18th, 1886, might be reviewed, rescinded or varied by expunging the conditions which had been imposed by it.

The learned judge varied the order of his predecessor only to the extent of reducing the amount to be paid to 15*s.* in the pound instead of 20*s.*, but on January 29th, 1889, the case of *In re Huggins, Ex parte Huggins* (see *ante*, p. 88; L. R. 22 Q. B. D. 279) was decided by which it was held that "The Court cannot under section 28 of the Bankruptcy Act, 1883, make a conditional order of discharge and also suspend the order."

On that decision a further application was on June 20th, 1889, made to the County Court judge to review, rescind or vary the order by expunging the conditions, which he refused to do and from that refusal the bankrupt now appealed.

The three years suspension of the bankrupt's discharge had expired on March 18th, 1889.

The reasons for his refusal of the bankrupt's application were subsequently stated by the County Court judge as follows:—"In this case the Court sitting in Bankruptcy was asked to expunge the conditions of the original order made by His Honour Judge Bere on March 18th, 1886. The application was made on the authority of a case *In re Huggins, Ex parte Huggins* (see *ante*, p. 88). The term of suspension directed by the said order of the learned judge had already expired, and as to that part of the order it was put that there was no application, but it was contended upon *In re Huggins* that the Court could and ought to expunge the conditions which imposed upon the bankrupt the obligation of consenting to judgment for payment of his debts. There had been no appeal against the said order but in August, 1888, a motion was made to the Court to modify the conditions and an order was

thereupon made reducing the payments of the debts from 20s. to 15s. in the pound. The official receiver opposed the present application. I asked in the course of the argument whether counsel for the bankrupt could contend that the order appealed against was good in part and bad in part; or whether the application came to anything less than a motion to set aside the order as being wholly bad. It was argued that it could be treated as good as to the term of suspension and bad as to the condition. I did not accede to this argument and in the result I dismissed the motion intimating that I was not without doubt whether the application to me was one falling at all within section 104 subsection (1) of the Bankruptcy Act, 1883, which provides that the 'Court having jurisdiction in Bankruptcy may review, rescind or vary any order made by it under its bankruptcy jurisdiction'; that it was open to argument that the provision was intended only to authorise the Court to deal with orders originally rightly made within its powers but a remission of which might by reason of some subsequent circumstances have become expedient; that at all events I thought it right to decline to interfere but I intimated that the case involved a question of importance and that probably the bankrupt would desire to endeavour to obtain the opinion of the Court above. I added that if the Court above should be of opinion that it could and ought to interfere, and also that I had power to deal with the order appealed against, I would of course further hear the parties, and I also pointed out that if the Court above should set the order aside, it would seem that the bankrupt might have to apply to me for his order of discharge."

*Sidney Woolf*: for the bankrupt.

When the order was made on March 18th, 1886, the bankrupt was not represented either by counsel or solicitor and he had not seen the official receiver's report. The reason he did not appeal was because he had no means to do so. The present County Court judge seems really to have thought he had no power to deal with the order.

*Muir Mackenzie*: for the official receiver.

The application to the County Court judge was one which he

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was bound to refuse because it asked him that the order of March, 1886, might be reviewed, rescinded or varied by expunging from the order the conditions on which it was granted.

CAVE, J. :

Judgment.

That they clearly are not entitled to have. I see no reason however why the case should not be reheard. If the order is a bad order then there was no order of discharge at all. If the order is a good order in the sense that it cannot be treated as a void order yet, on the face of it, it is not a compliance with the Act and therefore the Court ought to rehear and modify its order. In any case it must go back. I cannot quite agree that the Court has only power to rehear where the order was rightly made. I think it is important that the Court should also have power to rehear where it comes to the conclusion that the order was wrongly made. The case must go back to the County Court Judge with an intimation from us, that the judge is at liberty to rehear the case and to make the order which he thinks ought to have been made in the first instance whatever that may be. I do not think he would be precluded at all from ordering judgment to be entered because the discharge has been suspended. That is the fault of the bankrupt himself in not appealing against the order. The judge must look at the whole of the circumstances including what has taken place and the mistake that has been made and say what under all those circumstances is the proper order to make. The appeal will be allowed and the case remitted back to the judge to rehear and make such order as he thinks fit under all the circumstances.

*Order accordingly.*

Solicitors : *Street & Poynder*, agents for *Hearle Cock & Parkin*,  
Truro, for the bankrupt.

*The Solicitor to the Board of Trade*, for the official  
receiver.

## PRACTICE.

IN RE WEBBER, EX PARTE WEBBER.

*Bankruptcy Act, 1883, sections 50, 54, 68 & 70.**Bankruptcy Appeals (County Courts) Act, 1884, section 2.**Appeal against receiving order by debtor—Notice to official receiver—Duty of official receiver as to appearing on appeal.*COURT OF  
APPEAL.BEFORE  
THE MASTER  
OF THE  
ROLLS,  
LINDLEY, L.J.,  
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December 20th.

Where a debtor appeals from a receiving order which has been made against him notice of the appeal must in all cases be served on the official receiver.

But the official receiver is not required in all cases to appear at the hearing of the appeal by reason of the fact that notice has been served on him ; and unless the official receiver has some substantial information to give to the Court he ought not to appear at such hearing.

**T**HIS was an Application by the debtor *J. G. Webber* for leave to appeal from a decision of the Divisional Court in Bankruptcy dismissing an appeal against a receiving order which had been made against the said debtor in the Barnstaple County Court.

The case raised an important question as to the duty of a debtor who appeals from a receiving order which has been made against him to serve the official receiver with notice of the appeal.

The case came before the Divisional Court in Bankruptcy on November 13th last, when a preliminary objection was taken by the petitioning creditor that notice of the appeal had not been served on the official receiver and that the appeal could not therefore be heard, but there being some doubt whether the official receiver had in fact been served or not the case was ordered to stand over.

On November 15th the case again came before the Court on which occasion the official receiver appeared by counsel and raised the further preliminary objection that the appeal was out of time, it being stated that notice of the intention of the debtor to appeal against the receiving order had not been given to the official receiver within the twenty-one days allowed in which to serve notice of appeal.

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The receiving order was made against the debtor in the Barnstaple County Court on May 22nd last, and on June 18th a letter was written to the official receiver on behalf of the debtor stating that he intended to appeal against it.

It was argued in the Divisional Court that the official receiver was not a necessary party to the appeal and need not be served with notice, but the Court held that on an appeal by a debtor from a receiving order made against him in the County Court the official receiver must be served with notice and they refused to extend the time owing to the conduct of the debtor.

The Divisional Court also refused to give leave to appeal from their decision and the debtor now applied to the Court of Appeal for that purpose.

*Hindmarsh*: for the debtor.

The present application is under section 2 of the Bankruptcy Appeals (County Courts) Act, 1884. The Divisional Court refused to give leave to appeal from their decision and I now ask your lordships to give leave. The Divisional Court dismissed the appeal on the ground that no notice had been given to the official receiver within the twenty-one days. Notice of appeal was given within the twenty-one days to the petitioning creditor. Under Order LVIII. Rule 2, of the Rules of the Supreme Court, "The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Court of Appeal may think fit." The Divisional Court also refused to extend the time under Rule 15 on the ground of the debtor's conduct. In *In re Fletcher, Ex parte Fletcher* (see *ante*, Vol. IV. p. 118) the Divisional Court held that "Where after a receiving order has been made against a debtor on a bankruptcy notice, the petitioning creditor is settled with, and with his assent

the debtor appeals for the purpose of having the receiving order set aside, it would appear that notice should be given to the official receiver, and where this was not done the Court discharged the receiving order as prayed, but directed that the order should not be drawn up for four days, and notice be given to the official receiver so as to enable him to come forward if he thought fit." But that case is really in my favour. Then in *Ex parte Ward, In re Ward* (L. R. 15 Ch. Div. 292 : 29 W. R. 206) it was held that "Notice of an appeal from the refusal to annul an adjudication of bankruptcy must be served on the trustee in the bankruptcy as well as on the petitioning creditor. And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed. The time for appealing will not be extended in such a case." But that case has no bearing on the present case of an official receiver. There there had been an adjudication and the property was vested in the trustee: but the property does not vest in the official receiver and the case is of no authority. I submit that all that is required is that notice should be given to the official receiver as an officer of the Court in order that he may be present if he has anything to say. Here there was ample notice given to him in time for that although it was not given within twenty-one days. Proper respondents must of course be served within twenty-one days, but the official receiver is not a proper respondent. He is only present as an officer of the Court. In any case I ask some indulgence for this debtor and that the time may be extended.

*Herbert Reed*: for the petitioning creditor.

The debtor has no right to ask for any indulgence as his conduct has been anything but what it ought to be. The Divisional Court stated that he had been dilatory in bringing the appeal but beyond this after the receiving order was made the debtor removed a shed from his property, took the roof off an engine house and cut down the main beams of his house when in the possession of the official receiver. He was bound to assist the official receiver and instead of this he destroyed his property. The debtor also made use of bad language and threats to the official receiver. The debtor used the time he got by entering the appeal in order to destroy his pro-

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perty. He was dilatory in bringing the appeal to the Divisional Court and he has again been dilatory in the present application for the appeal was dismissed on November 15th, and it is not until to-day—December 20th—that he comes to this Court. Further than this, on the main point, I submit that the official receiver is a necessary party to a receiving order. He is a necessary respondent to an appeal from a receiving order, at any rate, where there has been no stay of proceedings. He is directly affected. (Counsel referred to section 54, sub-section (1) : section 50, sub-sections (1) and (2) : section 68, sub-sections (1) and (3) : and section 70 of the Bankruptcy Act, 1888.) The official receiver used to be served, and in *In re Dixon & Wilson, Ex parte Dixon & Wilson* (see *ante*, Vol. I. p. 98 : L. R. 13 Q. B. D. 118), the Court laid down a rule for his guidance. He ought not to appear on the appeal unless he has something to tell the Court. It is extremely important that the official receiver should be served. The receiving order is not for the benefit of the petitioning creditor only but for the benefit of all the creditors and if the petitioning creditor should be settled with and not appear to oppose the appeal a receiving order would simply be a means of collecting a debt. Whether the property is vested or not the official receiver is trustee for the creditors. The rule is very strict in bankruptcy that appeals must be entered in time. The main object of the appearance of the official receiver would be to protect other creditors than the petitioning creditor who would know nothing of the appeal. If no notice is given to the official receiver the representative of the general body of creditors is kept in the dark (Counsel also referred to *In re Reed & Bowen, Ex parte the Chief Official Receiver*, see *ante*, Vol. IV. p. 225 : L. R. 19 Q. B. D. 174 : 56 L. J. Q. B. 447 : 56 L. T. 876 : 35 W. R. 660).

*Guiry (Horton with him)* : appeared for the official receiver.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment. In this case Mr. Justice CAVE refused to proceed with the appeal, on the ground that the official receiver had not been served with notice of appeal according to the rules laid down by Mr. Justice CAVE for the practice of his own Court and which had been the practice of

his own Court, viz.:—that he will not hear an appeal against a receiving order from a County Court unless the official receiver is served with notice of the appeal at the same time as the petitioning creditor is served. That rule Mr. Justice CAVE has laid down for the practice of the Court on the grounds of expediency and he has a very strong opinion on the subject. I have seen the learned judge on this question and I have ascertained from him that his opinion is most decidedly that for the safety of all parties that rule should be acted upon.

It is said, however, that the Divisional Court ought to have heard the appeal although the rule was not obeyed. Now I must say that I think the question whether the official receiver is a party "directly affected" within Order LVIII. Rule 2, of the Rules of the Supreme Court is doubtful and I do not think it is necessary to determine that question in this case, viz.:—whether he is a person "directly affected" by the appeal. I will only say I think it is doubtful. But even if he were not, the Court of Appeal which in this case was the Divisional Court in Bankruptcy, may direct notice to be served on any parties to the action or other proceeding or upon any person not a party, and whether the official receiver is a person directly affected or not he is certainly a person affected and Rule 2 of Order LVIII. gives Mr. Justice CAVE the power to make the salutary and desirable practice in his own Court which he has made.

If that be so can we say that the practice is wrong? So far from that Mr. Justice CAVE has convinced me that so far from being wrong it is a good and advisable rule to lay down. That he might have acted under Rule 15 of Order LVIII. I have no doubt. He might have given special leave to go on with the appeal, but Mr. Justice CAVE declined to do that. To say whether when the rule is broken you will grant an indulgence or not is a matter of discretion at any rate. Therefore I cannot say that Mr. Justice CAVE was bound to go on. Now shall we give any indulgence here? Is this a person who ought to be indulged? It is said that this is a poor and ignorant man, as if he was a poor labouring man who did not understand what he did. But he is not that. Has he done things contrary to law? He certainly has. He is a man who ought not to be indulged and I am clearly of opinion that the Court ought not to exercise its powers to give any indulgence.

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1889.

IN RE  
WEBBER,  
EX PARTE  
WEBBER.

But on a previous occasion we said we would consider what should be the rule in this Court as to service on the official receiver of notice of such an appeal. The decision of Mr. Justice CAVE is as I have said a good one. I was a little alarmed at first at the question whether the same rule in this Court ought to be adopted. I felt doubtful as to the expense which might have to be incurred if the same rule was applied to this Court and I am anxious to keep the expense down as much as I possibly can. I learn on enquiry, however, that service on the official receiver would only be the smallest expense. Therefore I think that this Court should have the same rule here. In that case we shall act in future that where there is an appeal to the Court as to a receiving order and notice is given as it must be given to the petitioning creditor, notice shall at the same time in all cases be given to the official receiver whether there is a stay of proceedings or not. We in fact make the same rule here as Mr. Justice CAVE has made in cases of such appeals from the County Court, reserving of course the right to grant an indulgence in any special case.

But I wish to say that that rule is not to alter the rule which we have already laid down for the guidance of the official receiver. If the official receiver has nothing to say he ought not to appear on the appeal. If the official receiver has something substantial to inform the Court about, he ought to come forward and tell it, but if not he ought not to come to the Court at all. He ought not to come when he will be only coming here for his costs. Nor will the rule we have laid down authorise the official receiver in making himself a partisan in the matter. He ought to stand by and see that whatever is right is done to all parties. The present appeal must therefore be dismissed.

LINDLEY, L. J.:

The general question whether the official receiver is "directly affected" within Rule 2 of Order LVIII. is I think open to some doubt, but I am fully alive to all that has been said as to the danger of collusive appeals and I entirely concur that the official receiver ought to be served in all cases of this nature.

**LOPES, L. J.:**

On the last occasion when this question was raised and ever since I have held a strong opinion of the expediency of the rule now laid down. In my opinion it is a most salutary rule. It prevents collusion between the petitioning creditor and the debtor behind the back of the official receiver and the expense is so small that it cannot militate against the expediency of the rule. Whether the official receiver is "directly affected" within Order LVIII., Rule 2 may be doubtful—or rather I should say must be doubtful after what the MASTER OF THE ROLLS and Lord Justice LINDLEY have said, but speaking for myself, from the fact that the official receiver represents the general body of the creditors and looking at his duties and position, I should have thought he was a party directly affected more especially as on an appeal from a receiving order the existence of his very office is called in question.

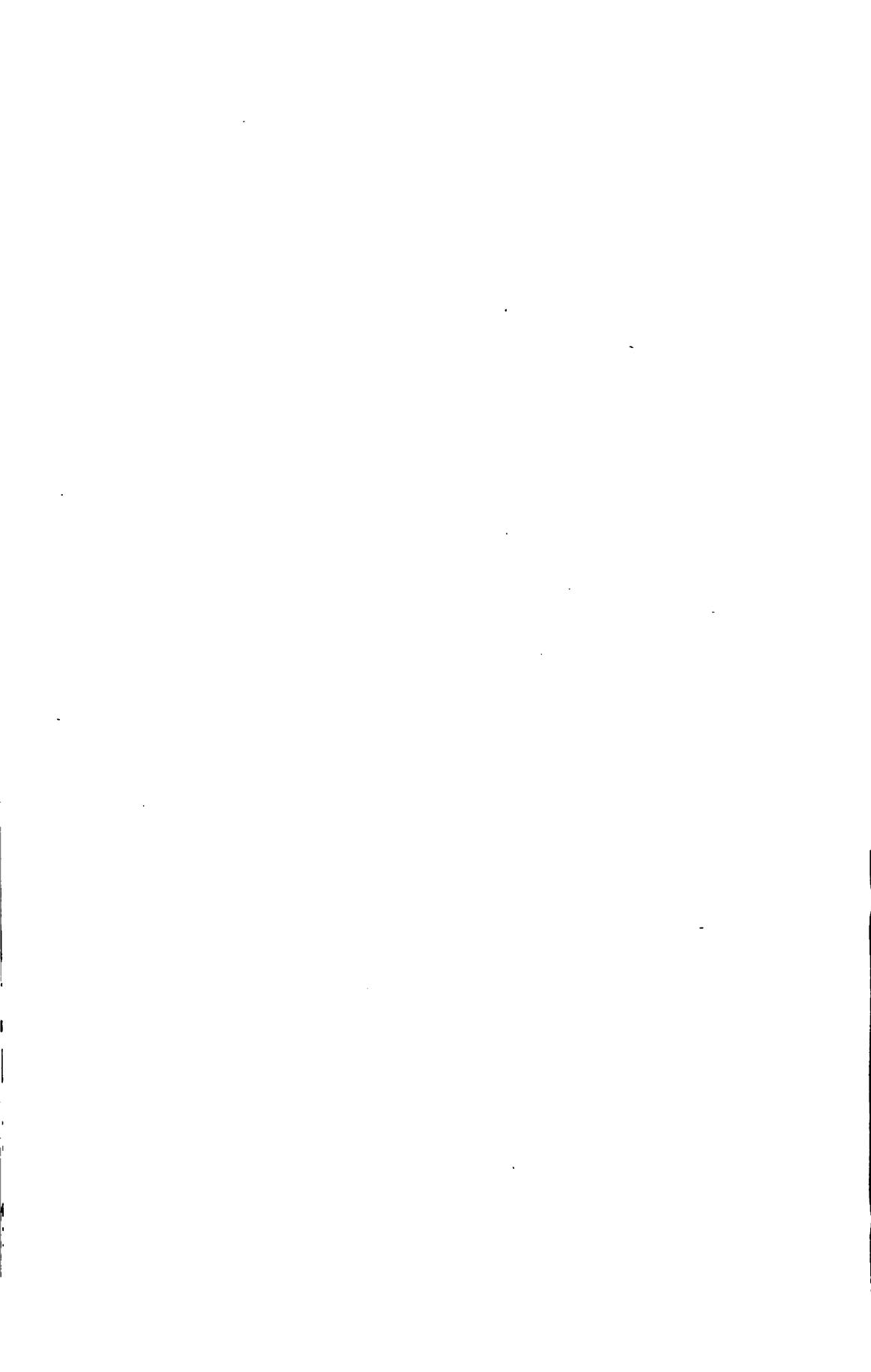
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*Appeal dismissed.*

Solicitors : *Morice, Toller & Blakesley*, agents for *Toller & Roberts*, Barnstaple, for the debtor.

*Church, Rendell & Co.*, agents for *A. F. Selden*, Barnstaple, for the petitioning creditor and the official receiver.

The case referred to in the above judgments was that of *In re Harris*, *Ex parte Harris*, a note of which appeared in the "Weekly Notes" and the "Solicitors' Journal" for November 80th last, in which the preliminary objection was taken to the hearing of an appeal against a receiving order that notice of the appeal had not been served on the official receiver, but it appearing that at the time when the receiving order was made a stay of proceedings had been granted pending an appeal, the Court allowed the appeal to be heard, and reserved for further consideration the question whether in a case where there was no stay of proceedings it was necessary that the official receiver should be served with notice.



## DIGEST OF CASES REPORTED IN THIS VOLUME.

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**ACT OF BANKRUPTCY—*Execution of Deed of Assignment.***]—(1) Where the assent of a creditor has been given to the execution by a debtor of a deed of assignment the Court will not as a general rule allow such creditor to take advantage of the act of bankruptcy committed by the debtor in executing the deed in order to present a bankruptcy petition. But the assent of the creditor must be obtained without fraud or misstatement, and if a debtor induces a creditor to give an assent by misrepresentations calculated to have effect on the minds of the creditors as to the true state of his affairs a bankruptcy petition may be presented by a creditor whose assent has been so obtained founded on the deed as an act of bankruptcy.

Thus where the debtors represented to a meeting of their creditors that they were in a solvent condition and could pay 20s. in the pound, thereby obtaining the assent of the creditors present to the execution of a deed of assignment, but the trustee under the deed subsequently sent out a statement showing a dividend of about 8s. in the pound.

*Held:* That a creditor who had signed the resolution agreeing to the execution of the deed was entitled to present a bankruptcy petition against the debtors; and that a receiving order must be made against them. *In re Tanenberg & Sons, Ex parte Perrier* . . . . . p. 49

(2) A deed of assignment for the benefit of creditors may be given in evidence as proof of an act of bankruptcy although neither stamped nor registered in accordance with the provisions of section 5 of the Deeds of Arrangement Act, 1887. *In re Hollinshead, Ex parte Heapy & Son* . . . . . p. 66

*Failure to comply with Bankruptcy Notice.*]—In an action instituted in the Probate Division of the High Court for the purpose of establishing a will a decree was made in favour of the plaintiff with costs, and an order was afterwards drawn up by which it was ordered that the defendant “do within seven days pay to Arthur Cheese, Esq., of 40, Chancery Lane, the solicitor for the plaintiff, the sum of 113/. being the amount of the plaintiff’s costs.” A bankruptcy notice was subsequently issued by the plaintiff against the debtor upon which a receiving order was made in the County Court.

*Held:* That under section 4, sub-section 1(g), of the Bankruptcy Act 1883, the plaintiff was not entitled to issue the bankruptcy notice; and that the receiving order must be set aside. *In re Arkell, Ex parte Arkell* . . . p. 182

*Departing from Dwelling-house.*]—On March 8th, 1889, the debtor, as a condition that time should be allowed him for payment of certain bills in respect of which he had become liable as surety, agreed to produce his books to an accountant for inspection, but instead of doing so he instructed an auctioneer to

sell certain of the book debts with the proceeds of which he paid the debts of two favoured creditors. From March 14th to the 16th the debtor absented himself from his dwelling-house leaving dishonoured a promissory note which had fallen due on March 13th, and having made no provision for the payment of another bill which became due during his absence. A receiving order having been made against the debtor in the County Court founded on his absence as an act of bankruptcy the debtor appealed.

*Held*: That the intention of the debtor in absenting himself was to delay his creditors; and that the receiving order was rightly made. *In re McKeand, Ex parte McKeand* . . . . . p. 240

**ANNUITY—Gift of by Will.**]—A testator by his will directed his trustees to pay out of the trust funds a sum of 250*l.* a year to his son during the life of the testator's wife, and after her decease to divide the said trust funds into four equal parts and to pay the income of one such fourth part to his said son during his life and after his decease in trust for his children as therein mentioned. The will also contained the following proviso:—"Provided also and I hereby declare that my said son G. C. Harvey shall not have power to alienate, charge, encumber or dispose of the said sum of 250*l.* bequeathed to him during the life of my said wife, or the income whether original or accruing to which he will be entitled after her decease; and in the event of his alienating, charging, encumbering or disposing of the same or any part thereof, my said trustees or trustee shall cease to pay him either the said sum of 250*l.* per annum or the income of the share whether original or accruing as aforesaid, and such last-mentioned income shall accumulate during the life of the said G. C. Harvey, and the accumulations thereof shall be held by my said trustee or trustees in trust for the person or persons who shall be entitled to the share of the said G. C. Harvey at his decease." After the death of the testator the son was adjudicated a bankrupt on a creditor's petition, and the trustee in the bankruptcy claimed the benefits given to the bankrupt under his father's will.

*Held*: That the bankruptcy did not operate as a forfeiture; and that the annuities remained payable and must be handed over to the trustee. *In re Harvey, Ex parte Pixley* . . . . . p. 95

**APPEAL—Notice of sent by Post.**]—An appeal is brought by serving the notice on the respondent which must be done within twenty-one days.

Where notice of appeal was posted on the last day allowed, but such notice did not reach the respondent until after the expiration of the twenty-one days, and a preliminary objection was taken that the appeal was out of time.

*Held*: That the objection must be allowed; and that the Court would not give leave to extend the time, the practice being settled and no valid reason having been put forward why indulgence should be shown. *In re Faulconer, Ex parte Cochrane* . . . . . p. 206.

**Against Interlocutory Order.**]—On appeal from an order made in the County Court the preliminary objection was taken that the appeal could not be heard on the ground that fourteen days' notice had been given, and the order appealed from being an interlocutory order, the notice of appeal must be a four days

notice in accordance with Order LVIII., rule 3, of the Rules of the Supreme Court, 1883.

The Court refused to allow the objection and decided to hear the appeal, there being considerable doubt as to the nature of an interlocutory order in bankruptcy. *In re Miles, Ex parte Turnbull* . . . . . p. 213

*Against Receiving Order.*]—(1) Where on an appeal from a receiving order it was stated that the petitioning creditor had been settled with, and with his assent, the debtor applied that the receiving order might be set aside, the Court refused to rescind the receiving order, and directed that the case should go back to the Registrar for his decision. *In re Ashbury, Ex parte Ashbury* . . . . . p. 256

(2) Where a bankruptcy petition is presented by a creditor founded on the failure of the debtor to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the registrar whether he will stay the proceedings or not, and the judgment debtor cannot in such case, under section 7, sub-section (4), of the Bankruptcy Act, 1883, claim a stay of proceedings as of right.

Where the registrar in the exercise of his discretion refuses to stay the proceedings, the Court of Appeal will not interfere with his decision unless it is clearly of opinion that the discretion was wrongly exercised. *In re French, Ex parte French* . . . . . p. 258

(3) *Notice to Official Receiver.*]—Where a debtor appeals from a receiving order which has been made against him, notice of the appeal must in all cases be served on the official receiver. But the official receiver is not required in all cases to appear at the hearing of the appeal, by reason of the fact that notice has been served on him; and unless the official receiver has some substantial information to give to the Court, he ought not to appear at such hearing. *In re Webber, Ex parte Webber* . . . . . p. 313

**ARRANGEMENT.**]—See *Scheme of Arrangement*.

**ASSIGNMENT.**]—See *Deed of Assignment*.

**BANKER.**]—Although the ordinary relation between a banker and his customer is merely that of debtor and creditor, and not of trustee and cestui que trust; where moneys are entrusted to a banker to collect and remit a trust is created, and in the event of the bankruptcy of the banker before the moneys are remitted payment may be demanded out of the estate. *In re Brown, Ex parte Plitt*.  
p. 81

**BANKRUPT**—*Property acquired before Discharge by.*]—The bankrupt before obtaining his discharge carried on business unknown to his trustee and acquired property. This property was subsequently taken possession of by the trustee, and application was thereupon made by a person who alleged that he had advanced certain moneys to the bankrupt for the purpose of improving such after-acquired property that he might be paid out of it, while the bankrupt himself applied for an indemnity.

*Held:* That as a matter of fact there was no proof that the alleged creditor had ever advanced any sums to the bankrupt which had not been repaid.

And further that in any case as the applicant knew that the bankrupt had not obtained his discharge, and that the property in respect of which he was dealing was the property of the creditors he had no equity.

Also that the bankrupt was not entitled to claim an indemnity and that he had not acted as the agent of the trustee.

But *quare* whether there is a complete immunity of the trustee from all liability in respect of honest claims made in such case against the bankrupt. *In re Clark, Ex parte Kearley* . . . . . p. 42

BANKRUPTCY (DISCHARGE AND CLOSURE) ACT, 1887.]—See *Discharge.*

BANKRUPTCY NOTICE.]—In an action instituted in the Probate Division of the High Court for the purpose of establishing a will, a decree was made in favour of the plaintiff with costs, and an order was afterwards drawn up by which it was ordered that the defendant “do within seven days pay to Arthur Cheese, Esq., of 40, Chancery Lane, the solicitor for the plaintiff, the sum of 113*l.*, being the amount of the plaintiff’s costs.” A bankruptcy notice was subsequently issued by the plaintiff against the debtor, upon which a receiving order was made in the County Court.

*Held:* That under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, the plaintiff was not entitled to issue the bankruptcy notice; and that the receiving order must be set aside. *In re Arkell, Ex parte Arkell* . . . p. 182

BILL OF SALE.]—(1) On August 29th, 1887, certain leasehold premises, together with the fixed machinery and effects in and upon the said premises, were purchased by the bankrupt out of moneys provided by the applicant, upon the understanding and agreement that he should hold the said property, plant, machinery, and effects as trustee for and on behalf of the applicant until such time as he should require an assignment of the same. On February 7th, 1888, the bankrupt deposited with the applicant the deeds and documents of title relating to the said property, together with a memorandum whereby after reciting the terms of the purchase he undertook upon demand to execute in favour of the applicant an assignment of the property either by way of mortgage for securing the repayment of the money advanced, or absolutely, as the applicant should elect; and until such election was exercised he deposited with the applicant the lease and documents of title relating to the property as an equitable mortgage. In July, 1888, a receiving order was made against the bankrupt, and the plant, machinery, and effects upon the premises were subsequently claimed by the official receiver on the ground that the memorandum was an assignment of trade machinery and required to be registered as a bill of sale.

*Held:* That the document in question was not an assignment of the trade machinery, and was not a bill of sale within the meaning of the Acts; and that the mortgagee was entitled to the property claimed. *In re Lusty, Ex parte Lusty* . . . . . p. 18

(2) Certain goods of the debtor having been seized by the sheriff under a writ of execution, an order was made by consent giving the sheriff power to sell such goods by private contract to the appellant Company. The goods were accordingly sold to the Company for the amount of the execution debt, the money being paid to the sheriff's officer and a receipt for the money together with an inventory of the goods sent by post. On the same day the Company let the goods to the wife of the debtor under a hiring agreement. The receipt and inventory were not registered, and on the subsequent bankruptcy of the debtor the goods in question were claimed by his trustee.

*Held:* That the transaction was one of purchase and sale and that the title was complete before the receipt and inventory was signed or came into existence; that there was therefore no document which required registration under the Bills of Sale Act; and that the trustee was not entitled to the goods.

A receipt which requires to be registered as a bill of sale under the Bills of Sale Acts, is one which is intended to be the instrument of transfer or a record of the transaction, and where there is no evidence of any intention of that kind a receipt signed by the seller of goods need not be registered. *In re Jones, Ex parte The Tower Furnishing Company* . . . . . p. 193

(3) A testator by his will gave to his wife (*inter alia*) "the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and subject as aforesaid, I give and bequeath all my said pictures to and for my son (the debtor) for his own absolute use and benefit." After the death of the testator, but during the lifetime of the mother, the debtor executed an assignment of mortgage by way of security for an advance by which, as mortgagor and beneficial owner, he assigned (*inter alia*) "all that the share and interest of him the said (debtor) under the will and codicil of his father deceased and of and in the sums of money, hereditaments and premises devised and bequeathed thereby, expectant upon the decease of his mother." A receiving order having been subsequently made against the debtor upon which he was adjudicated bankrupt, the trustee in bankruptcy applied for an order declaring that he was entitled, as against the mortgagee, to the pictures in question, on the ground that the assignment had not been registered.

*Held:* That the only interest which the bankrupt had in the pictures was a *chattel in action*, and as such it was not affected by the Bills of Sale Acts. *In re Tritton, Ex parte Singleton* . . . . . p. 250

BOARD OF TRADE—*Objection to Trustee by.*]—Where objection is taken by the Board of Trade under section 21 of the Bankruptcy Act, 1883, to a trustee appointed by the creditors on the ground that "his connection with or relation to the estate of the bankrupt makes it difficult for him to act with impartiality in the interest of the creditors generally," and it is alleged that the person so appointed has dealt with the estate of the bankrupt with notice of an available act of bankruptcy and that he is accountable to the trustee in the bankruptcy in respect of his dealings with the estate, it is not essential that the Board of Trade should establish any absolute act of bankruptcy or personal liability of such person to the estate, but it is sufficient to show that there is a necessity to have an account taken which may or may not disclose personal

liability. And it would seem that it is not requisite on the Board of Trade to take such account and judge of the liability, but that it is for the trustee to take it in the bankruptcy.

Where shortly before the bankruptcy an accountant at the request of the principal creditor of the debtor took possession of the debtor's estate for the purpose of controlling his receipts and expenditure, the account subsequently rendered in respect of such dealings with the estate showing a balance of 26*l.* which the accountant claimed to retain as charges which he might properly make against the bankrupt.

*Held:* That the Board of Trade was justified in objecting to the appointment by the creditors of such accountant as trustee in the bankruptcy : and that the objection must be sustained. *In re Stovold, Ex parte The Board of Trade*

p. 7

*Right to demand Account from Trustee.*]—The fact that there is no evidence of any moneys remaining in the hands of a trustee who is ordered by the Board of Trade to furnish an account under section 162 of the Bankruptcy Act, 1883, will not justify such trustee in refusing to comply with the requirements of the order so made.

Thus where a scheme of arrangement under a liquidation petition was accepted by the creditors by which 20*s.* in the pound was paid, and the debtor obtained his discharge, but the trustee after his release was required by the Board of Trade to furnish a proper account.

*Held:* That the Board of Trade were entitled to demand that an account should be rendered ; and that the trustee must comply with the order. *In re Calderwood, Ex parte The Board of Trade*. . . . . p. 104

**BOOK DEBTS.**]—By an order dated May 14th, 1887, by which the plaintiff obtained final judgment in an action, a receiver was appointed to carry on the business of the defendant, and to collect and get in outstanding debts. By a further order dated December 20th, 1887, the order of May 14th, 1887, was rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the receiver was to continue to act for the plaintiff with power to issue to any of such book debtors a circular in prescribed form : and it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to and accepted by the plaintiff in satisfaction of his judgment debt interest and costs : and after giving the defendant power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by the defendant on or before March 31st, 1888, the plaintiff should be at liberty to give notice of the order of May 14th, 1887, and of that order in the form prescribed in the second schedule, to each of the debtors mentioned in the said first part and to collect and recover such debts in his own name. On February 13th, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of December 20th, 1887, a notice requiring payment and stating that the defendant's firm were "closing up accounts with a former member," and that it was "necessary to collect all outstanding debts." On February 23rd, 1888, the defendant in the action committed an act of bank-

ruptcy upon which a petition was presented against him. On April 4th, 1888, the plaintiff without knowledge of the act of bankruptcy or of the petition, sent to the debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver and the assignment. In May, 1888, the debtor was adjudicated bankrupt and the trustee claimed the scheduled debts.

*Held:* That the order appointing the receiver did not constitute the plaintiff a secured creditor : that the order of December 20th, 1887, transferred the book debts to the plaintiff but left them in the order and disposition of the bankrupt without notice : and that although the debts in the first part of the schedule were taken out of the order and disposition clause by the notice of April 4th, 1888, those contained in the other three parts of the schedule were in the order and disposition of the bankrupt at the time of the bankruptcy, the notice sent out by the receiver on February 13th, 1888, being insufficient. *In re Tillett, Ex parte Kingscote.* . . . . . p. 70

CHARGING ORDER.]—See Costs.—Partnership Action.

**CHOSE IN ACTION.]**—A testator by his will gave to his wife (*inter alia*) “the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and subject as aforesaid, I give and bequeath all my said pictures to and for my son (the debtor) for his own absolute use and benefit.”

After the death of the testator, but during the lifetime of the mother, the debtor executed an assignment of mortgage by way of security for an advance by which, as mortgagor and beneficial owner, he assigned (*inter alia*) “all that the share and interest of him the said (debtor) under the will and codicil of his father deceased and of and in the sums of money, hereditaments and premises devised and bequeathed thereby, expectant upon the decease of his mother.”

A receiving order having been subsequently made against the debtor upon which he was adjudicated bankrupt, the trustee in the bankruptcy applied for an order declaring that he was entitled, as against the mortgagee, to the pictures in question, on the ground that the assignment had not been registered.

*Held:* That the only interest which the bankrupt had in the pictures was a *chose in action*, and as such it was not affected by the Bills of Sale Acts. *In re Tritton, Ex parte Singleton.* . . . . . p. 250

**COMMITTAL, ORDER OF—Against Solicitor.]**—Where a solicitor was ordered under rule 112 of the Bankruptcy Rules, 1886, to repay to the trustee by reason of the gross proceeds of the assets not exceeding 300*l.*, a certain sum paid to him as costs on the higher scale together with the costs of the order, and the solicitor repaid the amount so received by him in excess but failed to pay the costs, and application was made for his committal, the Court in the absence of authority refused to make an order to commit, being doubtful whether the respondent had been ordered to pay the money in respect of which a committal order was asked for in his character of solicitor. *In re Apelt, Ex parte Byrne.* . . . . . p. 102

*Against Trustee.]*—Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate

of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys together with a further sum as interest at the rate of 20 per cent charged under section 74, sub-section (6) of the Bankruptcy Act, 1883, and the Board of Trade applied for an order of committal.

*Held:* That an immediate order of committal must be made in respect of the principal sum; but that such order would not issue for a week and not go out at all if within that time the trustee should pay into the Bankruptcy Estates Account the amount due, together with the costs of the motion.

That an order would be made directing the trustee to comply with the order of the Board of Trade requiring him to pay the sum charged as interest within a fortnight.

Where a trustee who retains moneys belonging to the estate has been removed from office interest may be charged during the time he so retains the moneys in his hands and not only up to the time of his removal. *In re Tatum, Ex parte The Board of Trade . . . . . p. 107*

*Application to Rescind.]*—Where an order was made against a trustee who had failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate, ordering him to be committed to prison in the event of his not paying the amount specified within a week, and the terms of the order not being complied with, a warrant was issued against the trustee, but the amount in question was subsequently paid by a guarantee society, and the trustee applied that the order of committal might be rescinded.

*Held:* That the money having been paid there was no longer any default on the part of the trustee; and that the order for committal must be discharged. *In re Tatum, Ex parte Harker . . . . . p. 179*

**COMPANY.]**—After a receiving order had been made against the debtor, judgment in favour of the plaintiff was given in an action brought by reason of material misrepresentations contained in the prospectus of a company whereby such plaintiff had been induced to accept debentures, and a proof was subsequently tendered against the estate of the debtor who was one of the directors of the company for the amount claimed.

*Held:* That the proof in question was rightly rejected by the trustee. *In re Giles, Ex parte Stone . . . . . p. 158*

*Fraud by Bankrupt in Formation of.]*—In June, 1887, from a statement prepared by the brother of the bankrupt with whom he was trading in partnership, it appeared that during the two previous years they had incurred a loss of 1,199*l.*, and they were advised by their solicitor that the proper course was to call their creditors together. On the suggestion of another solicitor, however, the books of the firm were handed over to an accountant nominated by him, who drew up a balance sheet showing an average net profit of 12 per cent. for three years, and a prospectus was thereupon issued founded on the accountant's report, the business being converted into a limited liability company. After carrying on business for three months the company went into liquidation, and the brothers were shortly afterwards adjudicated bankrupt. The County Court judge absolutely refused the bankrupt his discharge.

*Held*: That the bankrupt must have known that the prospectus in which he joined was totally false : that by putting forward statements in the prospectus which he knew to be untrue he was guilty of fraud, and that the County Court judge was fully justified in absolutely refusing his discharge.

*Per CHARLES, J.*: That even if the bankrupt was not fully aware of the true state of affairs he had under the circumstances placed himself in the position of a person who was guilty of fraud, in that he had made himself a party to the issuing of a prospectus for the purpose of obtaining money, being utterly regardless whether the statements contained in it were true or not. *In re Duce & Duce, Ex parte James Duce*. . . . . p. 290

**COMPROMISE—By Trustee.**]—A compromise entered into by the trustee in the bankruptcy in respect of a claim made against the bankrupt's estate was approved by a majority of the committee of inspection, but at a subsequent general meeting of the creditors a resolution was passed refusing to accept the compromise. The trustee applied to the Court for leave to carry out the compromise notwithstanding this resolution.

*Held*: That the resolution refusing to approve the compromise having been passed by the creditors *bond fide*, and with a view to their own interests after due consideration of the matter in question, the Court would not overrule their decision, and that the compromise must be abandoned. *In re Ridgway, Ex parte Hurlbatt* . . . . . p. 277

**CONVEYANCING—Costs of.**]—Rule 112 of the Bankruptcy Rules, 1886, by which a solicitor's costs in all proceedings under the Act in which costs are payable out of the estate are reduced to three-fifths of the ordinary allowance where the assets do not exceed 300*l.*, does not apply to costs of conveyancing matters, the solicitor's remuneration in such case being regulated by the General Order under the Solicitor's Remuneration Act, 1881, in accordance with Rule 2 of the General Regulations contained in the Appendix to the said Rules. *In re Parfitt, Ex parte The Board of Trade* . . . . . p. 166

**COSTS—Of Petition.**]—Objection having been taken by the debtors to a bankruptcy petition presented against them on the ground that the petitioning creditor had assented to the deed of assignment which he relied upon as the act of bankruptcy, the hearing of such petition was, after certain evidence had been taken, adjourned *sine die* with liberty to apply.

Shortly afterwards a receiving order was made against the debtors on the petition of another creditor who had not assented to the deed, and the former petition was subsequently dismissed by the County Court registrar with costs.

*Held*: That although the registrar was right in refusing to allow the costs of the first petition to come out of the estate ; yet he was not justified under the circumstances in directing the creditor to pay the costs of the bankrupts ; and that the proper order to be made would be that the petition be dismissed without costs. *In re Smith & Sons, Ex parte Rook* . . . . . p. 30

**Of Solicitor.**]—(1) During the pendency of a partnership action between the debtors they were adjudicated bankrupt, and an order by consent was subsequently made by which the receiver in the action was directed to pass his

accounts and to tax the costs, and that such costs when taxed be paid by the receiver out of the balance in his hands and the residue of the balance be paid to the trustee in the bankruptcy.

*Held:* That on the true construction of the order the receiver was right in paying to the solicitors of the plaintiff and defendant in the action their taxed costs; and in handing over the balance after such payment to the trustee in the bankruptcy.

But that such an order could not be binding on the trustee except in so far as he had made it binding on him by assenting to it.

Where after the commencement of a partnership action a receiving order is made against the parties, the solicitors in the action have no right to obtain behind the back of the trustee in the bankruptcy a consent order by means of which their costs will be paid out of the partnership assets.

In order to obtain such an order the trustee must be made a party to the application and if that is not done he is at liberty to apply to the Court of Bankruptcy for a declaration that the consent order is of no worth as against him. *In re Chantry & Brewster, Ex parte Peace* . . . . . p. 33

(2) Where a solicitor was ordered under Rule 112 of the Bankruptcy Rules, 1886, to repay to the trustee, by reason of the gross proceeds of the assets not exceeding 300*l.*, a certain sum paid to him as costs on the higher scale together with the costs of the order, and the solicitor repaid the amount so received by him in excess but failed to pay the costs, and application was made for his committal, the Court in the absence of authority refused to make an order to commit, being doubtful whether the respondent had been ordered to pay the money in respect of which a committal order was asked for in his character of solicitor. *In re Apelt, Ex parte Byrne* . . . . . p. 102

(3) Rule 112 of the Bankruptcy Rules, 1886, by which a solicitor's costs in all proceedings under the Act in which costs are payable out of the estate are reduced to three-fifths of the ordinary allowance where the assets do not exceed 300*l.*, does not apply to costs of conveyancing matters, the solicitor's remuneration in such case being regulated by the General Order under the Solicitor's Remuneration Act, 1881, in accordance with Rule 2 of the General Regulations contained in the Appendix to the said Rules. *In re Parfitt, Ex parte The Board of Trade* . . . . . p. 166

(4) Where in a partnership action in the Chancery Division a receiver has been properly appointed, but a receiving order having been subsequently made against the partners, the proceedings are transferred to the Bankruptcy Court, the Court acting on the principles of the Court of Chancery, will give a charge on the funds collected by the receiver in favour of the solicitor of the plaintiff in the action.

But if it appears that at the time of instituting the action the solicitor was well aware that the partnership was insolvent and nevertheless brings the action and obtains the order for the appointment of a receiver when proceedings might be taken in bankruptcy, for the purpose of making costs, the Court will hold that such costs were not *bond fide* incurred in preserving the assets of the partnership, and will in such case refuse to make a charging order. *In re Nicholas & Paine, Ex parte Lovett & Co.* . . . . . p. 173

(5) Where a solicitor is appointed trustee in a bankruptcy his remuneration must be in the nature of a commission or percentage ; and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings.

At the first meeting of creditors a solicitor was appointed trustee in the bankruptcy at a remuneration to be fixed by the committee of inspection, and a resolution was subsequently passed by such committee, " that the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy." Under this resolution the trustee did the legal work arising in connection with the estate and carried in a bill of costs therefor, which was allowed by the taxing-master.

*Held* : That the taxing-master was wrong in allowing the costs : that the resolution passed by the committee of inspection was of no effect, and the result was that no remuneration had been voted to the trustee, whose proper course was to send in his bill for taxation under section 72, sub-section (4), of the Bankruptcy Act, 1883, as if no remuneration had been voted. *In re Wayman, Ex parte The Board of Trade* . . . . . p. 272

(6) On August 1st, 1888, the debtor gave to his solicitor who had acted for him in previous litigation with the petitioning creditor a charge on his house for costs, the solicitor at the same time agreeing to obtain for the debtor an advance of 250*l.* on such charge. On August 31st, 1888, a receiving order was made against the debtor, the act of bankruptcy alleged being the departure of the said debtor from his dwelling-house with intent to defeat his creditors on July 31st, 1888. The debtor was adjudicated bankrupt and the trustee sought to set aside the charge as being a fraudulent preference of the solicitor, and given to him with the knowledge of the act of bankruptcy.

*Held* : (1) That the object of the debtor being to benefit himself by getting the 250*l.*, and not to benefit the solicitor, the transaction was not a fraudulent preference.

(2) That an allegation against a solicitor of entering into an arrangement of this nature with knowledge of a previous act of bankruptcy was one which required to be supported by the strictest proof ; and that there was nothing in the present case to lead the Court to come to any such conclusion. *In re Arnott, Ex parte Barnard* . . . . . p. 215

*Of Trustee.]*—Although a trustee in bankruptcy has a right to bring motions and initiate proceedings which, if properly brought, will be paid for out of the assets of the estate, if he so acts as to recklessly institute litigation, and causes matters to be brought before the Court where, by proper management, litigation might have been avoided, the costs of such proceedings will not be allowed out of the estate, but the trustee will have to pay the costs out of his own pocket. *In re Bryant, Ex parte Gordon* . . . . . p. 262

CREDITOR—Secured.]—(1) Where an order was obtained by a judgment creditor appointing a receiver to receive the stock-in-trade and other property and effects belonging to the judgment debtor, but without prejudice to the

rights of any prior incumbrancer or of the landlord of the premises, all further questions being reserved until further order of the Court ; and the receiver took possession of the goods under this order and continued in possession of them until a receiving order was made against the debtor, upon which he was adjudicated bankrupt, no part of the goods having been then sold.

*Held* : (1) That the judgment creditor did not by reason of the order appointing the receiver become a "secured creditor" of the bankrupt within the meaning of section 9 of the Bankruptcy Act, 1883.

(2) That the order appointing the receiver was not an equitable execution, and that, even if it were, section 45 of the Bankruptcy Act, 1883, applied, and the execution not having been completed by sale before the date of the receiving order, the creditor was not entitled to retain the benefit of it as against the trustee in the bankruptcy. *In re Dickenson, Ex parte Charrington & Co.* . . . . . p. 1

(2) By an order dated May 14th, 1887, by which the plaintiff obtained final judgment in an action, a receiver was appointed to carry on the business of the defendant, and to collect and get in outstanding debts. By a further order dated December 20th, 1887, the order of May 14th, 1887, was rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the receiver was to continue to act for the plaintiff with power to issue to any of such book debtors a circular in prescribed form : and it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to and accepted by the plaintiff in satisfaction of his judgment debt, interest, and costs : and after giving the defendant power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors, or redeemed by the defendant on or before March 31st, 1888, the plaintiff should be at liberty to give notice of the order of May 14th, 1887, and of that order in the form prescribed in the second schedule, to each of the debtors mentioned in the said first part, and to collect and recover such debts in his own name. On February 13th, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of December 20th, 1887, a notice requiring payment and stating that the defendant's firm were "closing up accounts with a former member," and that it was "necessary to collect all outstanding debts." On February 23rd, 1888, the defendant in the action committed an act of bankruptcy upon which a petition was presented against him. On April 4th, 1888, the plaintiff, without knowledge of the act of bankruptcy or of the petition, sent to the debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver and the assignment. In May, 1888, the debtor was adjudicated bankrupt and the trustee claimed the scheduled debts.

*Held* : That the order appointing the receiver did not constitute the plaintiff a secured creditor : that the order of December 20th, 1887, transferred the book debts to the plaintiff, but left them in the order and disposition of the bankrupt without notice : and that although the debts in the first part of the schedule were taken out of the order and disposition clause by the notice of April 4th, 1888, those contained in the other three parts of the schedule were

in the order and disposition of the bankrupt at the time of the bankruptcy, the notice sent out by the receiver on February 13th, 1888, being insufficient. *In re Tillett, Ex parte Kingscote* . . . . p. 70

*Assent of, to Receiving Order being Rescinded.*]—(1) Where a receiving order has been made against a debtor, and where there has not been payment of the debts in full, and no suggestion is raised that such receiving order has been wrongly made, it is not sufficient in order to obtain a rescission of the receiving order for the debtor to collect the assents of his creditors to such rescission.

In order to move the Court to interfere in the matter the debtor ought to bring before it some clear ground for thinking that what is put forward other than a payment of the debts in full is a *bona fide* proposal which it will be in the interests of the creditors to uphold, and also one which is not detrimental to the public at large.

Such proposal must take the form of some scheme of arrangement, and, if that arrangement is not in substance the same as an arrangement which would satisfy the requirements of section 18 of the Bankruptcy Act, 1883, the fact of the debtor not proceeding under that section must be carefully considered by the Court before it allows a receiving order to be annulled; although an absolute rule has not been laid down that where the scheme of arrangement which is proposed is equivalent to a scheme under section 18, and can be accepted with perfect safety, the Court is bound at once to reject the proposal because all the formalities of section 18 have not been fulfilled.

The question whether a receiving order ought to be set aside or not is a matter of discretion in each particular case, and the Court of Appeal will not interfere in such a matter unless it is clearly of opinion on all the facts that the discretion as exercised was wrong. *In re Hester, Ex parte Hester* . . . p. 85

(2) Where on an appeal from a receiving order it was stated that the petitioning creditor had been settled with, and with his assent, the debtor applied that the receiving order might be set aside, the Court refused to rescind the receiving order, and directed that the case should go back to the registrar for his decision. *In re Ashbury, Ex parte Ashbury* . . . . p. 256

*Debtor having only one.*]—The fact that the debtor has no other creditor in England is not necessarily a sufficient reason for refusing to make a receiving order: it is not the duty of the petitioning creditor to prove the existence of other creditors: and the mere fact that a debtor states that he has only one creditor is not sufficient to cause the registrar to dismiss the petition. *In re Hecquard, Ex parte Hecquard* . . . . p. 282

**DEED OF ASSIGNMENT.**]—(1) Where the assent of a creditor has been given to the execution by a debtor of a deed of assignment the Court will not as a general rule allow such creditor to take advantage of the act of bankruptcy committed by the debtor in executing the deed in order to present a bankruptcy petition. But the assent of the creditor must be obtained without fraud or misstatement, and if a debtor induces a creditor to give an assent by misrepresentations calculated to have effect on the minds of the creditors as to the true state

of his affairs, a bankruptcy petition may be presented by a creditor whose assent has been so obtained founded on the deed as an act of bankruptcy.

Thus where the debtors represented to a meeting of their creditors that they were in a solvent condition and could pay 20s. in the pound, thereby obtaining the assent of the creditors present to the execution of a deed of assignment, but the trustee under the deed subsequently sent out a statement showing a dividend of about 8s. in the pound.

*Held:* That a creditor who had signed the resolution agreeing to the execution of the deed was entitled to present a bankruptcy petition against the debtors; and that a receiving order must be made against them. *In re Tanenberg, Ex parte Perrier* . . . . . p. 49

(2) A deed of assignment for the benefit of creditors may be given in evidence as proof of an act of bankruptcy although neither stamped nor registered in accordance with the provisions of section 5 of the Deeds of Arrangement Act, 1887. *In re Hollinshead, Ex parte Heapy & Son* . . . . . p. 66

(3) A deed of arrangement executed by a debtor on June 25th, 1888, purported to be made between the debtor himself, the trustee, a committee of inspection, and "the several persons, companies and firms whose names and seals are hereunto signed and affixed respectively, being creditors of the said (debtor) and all other creditors of the said (debtor) acceding hereto." The deed recited that "whereas the said debtor is indebted or liable to the said creditors in or for the several sums set opposite their respective names in the schedule hereto, and being unable to meet such liabilities in full" he assigned all his property to the trustee upon trust to pay the costs and priority debts "and to divide the balance of such moneys rateably among the creditors parties hereto, including as such creditors if the trustee and inspectors shall determine but not otherwise such persons being creditors of the said debtor as may have refused or neglected to execute these presents." On July 2nd, 1888, the deed was duly registered in accordance with the provisions of the Deeds of Arrangement Act, 1887, but in the copy of the schedule then filed the name of only one creditor appeared as having executed the deed, several other creditors executing subsequently. A receiving order having been made against the debtor, the trustee under the deed appealed against such order on the ground that the petitioning creditor's debt did not amount to £50, but the objection was taken that the trustee had no *locus standi* to appeal against the receiving order, since the deed produced by him had not been registered in the form it then was and was therefore void.

*Held:* That the deed was properly registered and had not been altered; and that the trustee was entitled to appeal. *In re Batten, Ex parte Milne* p. 110

#### DEEDS OF ARRANGEMENT ACT, 1887.]—See *Deed of Assignment*.

DIRECTOR—*Proof against.*]—See *Company*.

DISCHARGE—*Suspension of Conditional Order.*]—(1) The Court cannot under section 28 of the Bankruptcy Act, 1883, make a conditional order of discharge and also suspend the order.

Thus where the County Court judge suspended the discharge of a bankrupt

for six months and also attached the condition that the bankrupt should consent to judgment being entered against him under section 28, sub-section (6) of the Bankruptcy Act, 1883.

*Held:* That the order in question must be set aside, and the case remitted to the County Court judge for reconsideration. *In re Huggins, Ex parte Huggins* p. 38

(2) On March 18th, 1886, an order was made in the County Court that the discharge of the bankrupt be suspended for three years, and that it be then granted subject to the condition that he should consent to judgment being entered against him for the balance of the provable debts under section 28, sub-section (6) of the Bankruptcy Act, 1883. On June 20th, 1889, application was made by the bankrupt to the County Court to review, rescind, or vary its former order by expunging the conditions on which it had been granted, on the ground that the Court had no power under section 28 to make a conditional order of discharge and also suspend the order. The County Court judge refused the application, being doubtful whether, under section 104, sub-section (1) of the Bankruptcy Act, 1883, he had authority to deal with it.

*Held:* That the County Court judge had power to rehear the case, and that it must be remitted back to him for that purpose, and to make such order as he might think fit under all the circumstances. *In re Tregaskis, Ex parte Tregaskis* p. 309

*Suspension of Order.]*—On application by the bankrupt for his discharge an order was made by the County Court judge by which he suspended the discharge for three months or such further time until a sum be paid to the trustee which with the dividend already declared would be sufficient to make up 10s. in the pound to all the creditors “except those for money lent.”

*Held:* That such an order excepting a particular class of creditors could not be supported; and that the case must go back to the County Court judge for rehearing. *In re Carne, Ex parte Jackson* p. 55

*Condition that Bankrupt consent to Judgment.]*—In imposing as a condition of granting a bankrupt his discharge that he shall consent to judgment being entered against him for the balance of the provable debts, the Court ought to be careful that it does not place such a burden on the debtor as to do away with all motive for exertion on his part; and unless the Court finds a man in receipt of an income more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise proceeding to grant an order of discharge subject to such a condition.

Where the discharge of the bankrupt, against whom it was alleged that he had continued to trade after knowing himself to be insolvent and that he had brought on his bankruptcy by rash and hazardous speculations, was granted by the County Court judge only on the condition that he should consent to judgment being entered against him for the sum of 4,038*l.*, and it was shown that the bankrupt was a married man with four children and that his present earnings only amounted to 150*l.* a year with no prospect of an increase.

*Held:* That the order made in the County Court ought to be varied; and

that a proper order under the circumstances would be that the discharge of the bankrupt be suspended for three years. *In re Shackleton, Ex parte Shackleton* p. 304

*Absolute Refusal of Order.*]—(1) On application to the County Court for discharge, the official receiver reported that the bankrupt had brought himself within the provisions of section 28, sub-section (3) of the Bankruptcy Act, 1883, in that he had omitted to keep proper books, had continued to trade after knowing himself to be insolvent, and had contracted debts without reasonable ground of expectation of being able to pay them. The report also stated that the debtor with knowledge that a creditor's petition had been presented against him, vexatiously filed a petition on his own behalf in another Court, and he was further charged with inducing his brother to put in a pretended proof against the estate, and with conducting his business by means of manufactured bills.

*Held* : That the County Court judge was right in absolutely refusing the bankrupt his discharge.

*Per FIELD, J. :* That in addition to the offences mentioned in section 28, sub-section (3) of the Bankruptcy Act, 1883, the other facts alleged against the bankrupt were important for the Court to consider in determining whether a trader who had been guilty of them, and who had also committed any of the acts stated in the section, should be allowed to trade again. *In re Cook, Ex parte Cook* p. 224

(2) On June 12th, 1884, at a meeting of the creditors of a debtor whose affairs were being liquidated by arrangement under the Bankruptcy Act, 1869, resolutions were passed releasing the trustee and closing the liquidation, and it was also resolved that the discharge of the debtor be not granted ; but at a subsequent meeting held on April 11th, 1889, a resolution was obtained whereby the discharge of the debtor was granted, and application was thereupon made to the County Court registrar under section 125, sub-section (10) of the Bankruptcy Act, 1869, for a certificate to that effect. The County Court registrar refused to certify the discharge on the ground that the resolution in question was *ultra vires* and that the creditors had no power to pass it.

*Held* : That the registrar was right in refusing to grant a certificate ; and that the proper course for the debtor to take was to apply to the Court for his discharge under section 2 of the Bankruptcy (Discharge and Closure) Act, 1887. *In re Hart & Son, Ex parte Hart* p. 235

(3) In June, 1887, from a statement prepared by the brother of the bankrupt with whom he was trading in partnership it appeared that during the two previous years they had incurred a loss of 1199 $\frac{1}{2}$ ., and they were advised by their solicitor that the proper course was to call their creditors together. On the suggestion of another solicitor, however, the books of the firm were handed over to an accountant nominated by him who drew up a balance sheet showing an average net profit of 12 per cent. for three years, and a prospectus was thereupon issued founded on the accountant's report, the business being converted into a limited liability company. After carrying on business for three months the company went into liquidation, and the brothers were shortly afterwards

adjudicated bankrupt. The County Court judge absolutely refused the bankrupt his discharge.

*Held*: That the bankrupt must have known that the prospectus in which he joined was totally false : that by putting forward statements in the prospectus which he knew to be untrue he was guilty of fraud : and that the County Court judge was fully justified in absolutely refusing his discharge.

*Per CHARLES, J.* : That even if the bankrupt was not fully aware of the true state of affairs he had under the circumstances placed himself in the position of a person who was guilty of fraud in that he had made himself a party to the issuing of a prospectus for the purpose of obtaining money, being utterly regardless whether the statements contained in it were true or not. *In re Duce & Duce, Ex parte James Duce* . . . . . p. 290

*Application to vary former order.*]—An application made to the Court by a bankrupt for a review of an order refusing him his discharge ought not to be an *ex parte* application, and it ought to be made and decided upon by the Court before the facts of the case are gone into. On such application it is necessary that the bankrupt should make out a *prima facie* case, which the other side are not required to answer until the Court has determined whether or not it will grant an order for review. When the Court comes to the conclusion that there are *prima facie* grounds which lead it to think that the former order ought to be reviewed, if the other side are dissatisfied, their proper course is to appeal at once from the determination to review the order, and not to wait until the order has been brought up for review before appealing.

*Quare*: Whether where an order of discharge has been refused by reason of the conduct of a bankrupt, such bankrupt may not at a subsequent period again apply for his discharge, if he is able to shew that during the years it has been suspended he has displayed qualities the want of which caused his discharge to be refused on the previous occasion. *In re Lloyd, Ex parte Lloyd* . . . . . p. 297

*Misdemeanour committed by bankrupt*.—Section 2, sub-section (3), of the Bankruptcy (Discharge and Closure) Act, 1887, provides that on application by a bankrupt for his discharge the Court “shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part II. of the Debtors Act, 1869, or any amendment thereof.”

*Held*: That the words must be limited to mean “in all cases connected with or arising out of the bankruptcy in question ;” and where the alleged offence is in no way connected with the bankruptcy proceedings and does not affect the creditors or the property distributable amongst them the Court is not bound to inquire into it or to take it into consideration in granting the discharge.

Where in an Act of Parliament the Legislature has used language of so wide a character that if its full effect is given to it, it must lead to palpable injustice and will produce consequences revolting to the mind of any reasonable man, the Court will always endeavour, unless expressly prevented, to place upon such language a reasonable limitation on the ground that the Legislature could not have intended such consequences to ensue. *In re Brockelbank, Ex parte Dunn & others* . . . . . p. 138

**DISCLAIMER—*Of lease.***]—(1) Section 55, sub-section (6) of the Bankruptcy Act, 1883, provides that “The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.”

*Held*: That on application under the section it is in the discretion of the Court what persons from among those claiming interest or under liability should be made respondents to the application; and if at the hearing the Court is of opinion that any of such persons who have not been served with notice ought to have an opportunity of being heard it may direct service to be made.

Where the property disclaimed is of a leasehold nature it will always be prudent until the question raised and not settled in *In re Finley, Ex parte Hanbury* (see *ante*, Vol. 5, p. 248; L. R. 21 Q. B. D. 475) has been decided, that notice of the application should be served on the lessor. *In re Morgan, Ex parte Morgan* . . . . . p. 57

(2) Where application is made by a trustee in bankruptcy for leave to disclaim a lease the lessor is entitled as soon as he is served with notice of the trustee's application to serve notice of motion for a vesting order upon the parties interested, and he need not wait until leave to disclaim has been actually given; but in such case the lessor will run the risk of having his motion dismissed with costs if leave to disclaim is refused, or if it should prove that notwithstanding leave to disclaim being given the lessor is not entitled to a vesting order.

Whether an affidavit or other evidence is required in support of the notice of motion by the lessor is a matter for the judge whose duty it is to see that the respondents are not taken at a disadvantage by reason of their ignorance of the terms of the option which is offered to them.

As a general rule if the lessor succeeds in bringing himself within the provisions of section 55, sub-section (6), of the Bankruptcy Act, 1883, the Court after giving leave to disclaim ought to make a vesting order on his application, but such rule may be subject to exceptions. *In re Britton* . . . . . p. 130

(3) Where the owner of leasehold premises burdened with onerous covenants assigns such premises by way of mortgage for the whole of the residue of the term granted by the lease, and subsequently becomes bankrupt, the equity of redemption which vests in the trustee appointed in the bankruptcy is not property burdened with onerous covenants within the meaning of section 55 of the Bankruptcy Act, 1883, so as to render it necessary for the trustee to apply to the Court for leave to disclaim the lease. *In re Gee, Ex parte the Board of Trade* . . . . . p. 267

**DISCOVERY.]—See *Witness*.**

**“DWELLING-HOUSE” OF DEBTOR.]**—The debtor who was a domiciled Frenchman living in Paris came over to England for the purpose of carrying on an action instituted by him in the Chancery Division of the High Court and took five furnished rooms at 32, Piccadilly Circus. These rooms were some on the second and some on the third floor of the house, the debtor having the exclusive use of them, and he took them for a month at first and twice renewed the tenancy for a similar period. The debtor brought his wife and a French servant to the rooms, and he also engaged in his service a boy who had been employed by the former occupant from whom the debtor took them.

*Held*: That the debtor had had “a dwelling-house in England” within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act, 1883; and that a bankruptcy petition could be presented against him. *In re Hecquard, Ex parte Hecquard* . . . . . p. 282

**EXAMINATION.]**—See also *Public Examination*.

*Of Witness.]*—Where on application by the trustee an order is made under section 27 of the Bankruptcy Act, 1883, summoning a person to attend the Court to be examined respecting the debtor, his dealings or property, the Court has power in the event of the witness being prevented by illness from attending before it, to direct such examination to be conducted at the witness’s own residence before an officer of the Court or some other person appointed for the purpose. *In re Bradbrook, Ex parte Hawkins* . . . . . p. 188

**EXECUTION—*Completion of.*]**—Where an order was obtained by a judgment creditor appointing a receiver to receive the stock-in-trade and other property and effects belonging to the judgment debtor, but without prejudice to the rights of any prior incumbrancer or of the landlord of the premises, all further questions being reserved until further order of the Court; and the receiver took possession of the goods under this order and continued in possession of them until a receiving order was made against the debtor upon which he was adjudicated bankrupt, no part of the goods having then been sold.

*Held*: (1) That the judgment creditor did not by reason of the order appointing the receiver become a “secured creditor” of the bankrupt within the meaning of section 9 of the Bankruptcy Act, 1883.

(2) That the order appointing the receiver was not an equitable execution, and that, even if it were, section 45 of the Bankruptcy Act, 1883, applied, and the execution not having been completed by sale before the date of the receiving order, the creditor was not entitled to retain the benefit of it as against the trustee in the bankruptcy. *In re Dickenson, Ex parte Charrington & Co.* p. 1

**FRAUD—*By Bankrupt.*]**—In June, 1887, from a statement prepared by the brother of the bankrupt with whom he was trading in partnership it appeared that during the two previous years they had incurred a loss of 1,199*l.*, and they were advised by their solicitor that the proper course was to call their creditors together. On the suggestion of another solicitor, however, the books of the firm were handed over to an accountant nominated by him, who drew up a balance sheet showing an average net profit of 12 per cent. for three years, and a prospectus was thereupon issued founded on the accountant’s report, the

business being converted into a limited liability company. After carrying on business for three months the company went into liquidation, and the brothers were shortly afterwards adjudicated bankrupt. The County Court judge absolutely refused the bankrupt his discharge.

*Held*: That the bankrupt must have known that the prospectus in which he joined was totally false; that by putting forward statements in the prospectus which he knew to be untrue he was guilty of fraud; and that the County Court judge was fully justified in absolutely refusing his discharge.

*Per CHARLES, J.*: That even if the bankrupt was not fully aware of the true state of affairs he had under the circumstances placed himself in the position of a person who was guilty of fraud, in that he had made himself a party to the issuing of a prospectus for the purpose of obtaining money, being utterly regardless whether the statements contained in it were true or not. *In re Duce & Duce, Ex parte James Duce*. . . . . p. 290

**FRAUDULENT PREFERENCE.]**—(1) A payment made by a debtor within three months of his bankruptcy with the intention of reviving a real debt and not with a view of preferring one creditor before others, is not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

In 1862 the sum of 3,000*l.* was bequeathed to trustees in trust for a person for life and after his death such sum was to be divided between his two children. In 1876 the beneficiaries agreed that the money should be paid over to the person entitled for life for the purpose of being advanced to the bankrupt, who was the husband of one of the children. In 1879 the bankrupt ceased to pay interest, but in 1888 being in difficulties he sent a sum of 5*l.* to the person entitled for life with the express intention of reviving the debt of 3,000*l.* having regard to his possible bankruptcy. A proof subsequently tendered in the bankruptcy in respect of the loan was rejected by the trustee on the ground that the debt was barred by the Statute of Limitations and that the payment made being a fraudulent preference it could not operate to revive the debt.

*Held*: That the intention of the bankrupt being to revive an honest debt and not to prefer one creditor before others, the proof must be admitted. *In re Lane, Ex parte Gaze*. . . . . p. 143

(2) The debtor shortly before his bankruptcy transferred to his father certain shares of the value of 2,000*l.* in a company of which his father was the promoter and principal shareholder, the father at the same time paying off a charge of 10*l.* which had been effected on the shares by the debtor and also certain sums of money amounting to about 1,000*l.* received by the debtor on behalf of the said company and not accounted for. The shares in question constituted practically the whole of the assets of the debtor and the transaction was subsequently set aside by the County Court judge as being void against the trustee.

*Held*: That there being no evidence of any criminal proceedings having been contemplated against the debtor in respect of his alleged defalcations, and the father being well aware of the debtor's insolvent condition at the time when the transfer was made to him, the County Court judge was right in setting the transaction aside. *In re Boyd, Ex parte Boyd*. . . . . p. 209

(3) On August 1st, 1888, the debtor gave to his solicitor who had acted for him in previous litigation with the petitioning creditor a charge on his house for costs, the solicitor at the same time agreeing to obtain for the debtor an advance of 250*l.* on such charge. On August 31st, 1888, a receiving order was made against the debtor, the act of bankruptcy alleged being the departure of the said debtor from his dwelling house with intent to defeat his creditors on July 31st, 1888. The debtor was adjudicated bankrupt and the trustee sought to set aside the charge as being a fraudulent preference of the solicitor and given to him with the knowledge of the act of bankruptcy.

*Held:* (1) That the object of the debtor being to benefit himself by getting the 250*l.*, and not to benefit the solicitor, the transaction was not a fraudulent preference.

(2) That an allegation against a solicitor of entering into an arrangement of this nature with knowledge of a previous act of bankruptcy was one which required to be supported by the strictest proof; and that there was nothing in the present case to lead the Court to come to any such conclusion. *In re Arnott, Ex parte Barnard* . . . . p. 215

GROWING CROPS.]—On August 19th, 1887, the debtor executed a legal mortgage of his freehold property, and on August 22nd, 1887, he executed a second mortgage deed by which he conveyed all his rights in the said property, subject to the first mortgage, to his bankers in order to secure his current account. In April, 1888, judgment was recovered by the bankers in an action brought by them against the debtor, but on May 2nd, 1888, a receiving order was made against him and the official receiver subsequently became trustee in the bankruptcy. In June, 1888, certain growing crops of hay became ready for cutting and on June 25th the second mortgagees put a man into possession. By an agreement entered into on the same day between the second mortgagees and the official receiver the hay was afterwards cut and sold without prejudice to the rights of either party, and the official receiver claimed the proceeds as assets of the bankrupt divisible amongst his creditors.

*Held:* That the second mortgagees having gained lawful possession of the mortgaged land they were entitled as against the trustee in the bankruptcy to the crops which afterwards matured. *In re Gordon, Ex parte The Official Receiver* . . . . p. 150

HIRING AGREEMENT.]—Certain goods of the debtor having been seized by the sheriff under a writ of execution, an order was made by consent giving the sheriff power to sell such goods by private contract to the appellant company. The goods were accordingly sold to the company for the amount of the execution debt, the money being paid to the sheriff's officer and a receipt for the money together with an inventory of the goods sent by post. On the same day the company let the goods to the wife of the debtor under a hiring agreement. The receipt and inventory were not registered, and on the subsequent bankruptcy of the debtor the goods in question were claimed by his trustee.

*Held:* That the transaction was one of purchase and sale and that the title was complete before the receipt and inventory was signed or came into

existence ; that there was therefore no document which required registration under the Bills of Sale Act ; and that the trustee was not entitled to the goods.

A receipt which requires to be registered as a bill of sale under the Bills of Sale Acts, is one which is intended to be the instrument of transfer or a record of the transaction, and where there is no evidence of any intention of that kind a receipt signed by the seller of goods need not be registered. *In re Jones, Ex parte The Tower Furnishing Company* . . . . . p. 193

**INJUNCTION.]**—In 1885 an agreement was made in London by which the respondent was to act for the debtors' firm as agent in Australia, but in 1886 he was dismissed from service and commenced an action against the firm in the Australian Courts for breach of the agreement. In 1887 the senior partner of the firm died and his son was taken into the business, but in 1889 a receiving order was made against the firm and the official receiver applied for an injunction to restrain the respondent from proceeding with his action.

*Held* : That as the Court was not satisfied that the rights of the respondent as plaintiff in the action would not be prejudiced or that expense would be saved the application must be refused. *In re Spalding & Hodge, Ex parte The Chief Official Receiver* . . . . . p. 163

**INTERLOCUTORY ORDER IN BANKRUPTCY.]**—On appeal from an order made in the County Court the preliminary objection was taken that the Appeal could not be heard on the ground that fourteen days' notice had been given, and the order appealed from being an interlocutory order, the notice of appeal must be a four days' notice in accordance with Order LVIII., rule 3, of the Rules of the Supreme Court, 1883.

The Court refused to allow the objection and decided to hear the appeal, there being considerable doubt as to the nature of an interlocutory order in bankruptcy. *In re Miles, Ex parte Turnbull* . . . . . p. 213

**JUDGMENT—Right to go Behind.]**—On July 8th, 1887, judgment was signed under Order XIV. in an action brought against the debtor to recover the sum of 520*l.* alleged to be due for commissions executed and moneys paid on his behalf by the plaintiffs who carried on business as turf commission and betting agents. The judgment debt was not satisfied and a bankruptcy notice was subsequently issued against the debtor upon which he was adjudicated bankrupt, but a proof tendered by the plaintiffs in the action in respect of their debt was rejected by the official receiver as trustee, on the ground that the claim was founded on gaming transactions.

*Held* : That the fact that the judgment had been obtained was not conclusive ; and that the plaintiffs having failed to satisfy the Court that the debt arose from commission business, the decision of the official receiver must be affirmed. *In re Lopes, Ex parte Hardaway & Topping* . . . . . p. 245

**JURISDICTION.]**—(1) The Court has no jurisdiction under the Bankruptcy Act, 1883, to direct service on a debtor who is out of the jurisdiction of an order requiring him to attend for public examination. *In re Wendt, Ex parte The Official Receiver* . . . . . p. 127

(2) Where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition and to make a receiving order.

The mere fact of a bankruptcy petition being presented in the wrong Court by inadvertence will not invalidate the jurisdiction, and by section 97 of the Bankruptcy Act, 1883, the proceedings can be removed into the proper Court. *In re French, Ex parte French* . . . . . p. 258

LEASE.]—See *Disclaimer*.

MARRIED WOMAN—*Separate Property of.*]—Wedding presents given to a woman on occasion of her marriage are her separate property, and in the event of the subsequent bankruptcy of the husband they cannot be claimed by his trustee.

Prior to the marriage in 1882 an antenuptial settlement was executed by which it was agreed that if at any time during the intended coverture the wife, or the husband in her right should “by gift, will, settlement, succession, transmission, or otherwise” become beneficially entitled to any personal estate “except plate, trinkets, furniture and jewels” which were to be considered as property settled to the separate use of the wife, such property should come into settlement.

*Held:* That the covenant in question included gifts to the wife before the marriage, and was also sufficient to cover the gifts given to her on her marriage; and that the words were not confined so as to apply only to property which might be acquired by the modes mentioned at some future time. *In re Jamieson, Ex parte Pannell* . . . . . p. 24

MORTGAGE.]—(1) On August 19th, 1887, the debtor executed a legal mortgage of his freehold property, and on August 22nd, 1887, he executed a second mortgage deed by which he conveyed all his rights in the said property, subject to the first mortgage, to his bankers in order to secure his current account. In April, 1888, judgment was recovered by the bankers in an action brought by them against the debtor, but on May 2nd, 1888, a receiving order was made against him and the official receiver subsequently became trustee in the bankruptcy. In June, 1888, certain growing crops of hay became ready for cutting and on June 25th the second mortgagees put a man into possession. By an agreement entered into on the same day between the second mortgagees and the official receiver the hay was afterwards cut and sold without prejudice to the rights of either party, and the official receiver claimed the proceeds as assets of the bankrupt divisible amongst his creditors.

*Held:* That the second mortgagees having gained lawful possession of the mortgaged land, they were entitled as against the trustee in the bankruptcy to the crops which afterwards matured. *In re Gordon, Ex parte The Official Receiver* . . . . . p. 150

(2) On August 29, 1887, certain leasehold premises together with the fixed machinery and effects in and upon the said premises, were purchased by the bankrupt out of moneys provided by the applicant upon the understanding and agreement that he should hold the said property, plant, machinery and effects

as trustee for and on behalf of the applicant until such time as he should require an assignment of the same. On February 7th, 1888, the bankrupt deposited with the applicant the deeds and documents of title relating to the said property together with a memorandum whereby after reciting the terms of the purchase he undertook upon demand to execute in favour of the applicant an assignment of the property either by way of mortgage for securing the repayment of the money advanced, or absolutely, as the applicant should elect; and until such election was exercised he deposited with the applicant the lease and documents of title relating to the property as an equitable mortgage. In July, 1888 a receiving order was made against the bankrupt and the plant, machinery, and effects upon the premises were subsequently claimed by the official receiver on the ground that the memorandum was an assignment of trade machinery and required to be registered as a bill of sale.

*Held:* That the document in question was not an assignment of the trade machinery and was not a bill of sale within the meaning of the Acts; and that the mortgagee was entitled to the property claimed. *In re Lusty, Ex parte Lusty*

p. 18

(3) Where the owner of leasehold premises burdened with onerous covenants assigns such premises by way of mortgage for the whole of the residue of the term granted by the lease, and subsequently becomes bankrupt, the equity of redemption which vests in the trustee appointed in the bankruptcy is not property burdened with onerous covenants within the meaning of section 55 of the Bankruptcy Act, 1883, so as to render it necessary for the trustee to apply to the Court for leave to disclaim the lease. *In re Gee, Ex parte The Board of Trade*

p. 267

**OFFICIAL RECEIVER.]**—Where a debtor appeals from a receiving order which has been made against him notice of the appeal must in all cases be served on the official receiver.

But the official receiver is not required in all cases to appear at the hearing of the appeal by reason of the fact that notice has been served on him; and unless the official receiver has some substantial information to give to the Court he ought not to appear at such hearing. *In re Webber, Ex parte Webber* . p. 313

**ORDER AND DISPOSITION.]**—By an order dated May 14th, 1887, by which the plaintiff obtained final judgment in an action, a receiver was appointed to carry on the business of the defendant, and to collect and get in outstanding debts. By a further order dated December 20th, 1887, the order of May 14th, 1887, was rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the receiver was to continue to act for the plaintiff with power to issue to any of such book debtors a circular in prescribed form: and it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to and accepted by the plaintiff in satisfaction of his judgment debt interest and costs: and after giving the defendant power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by the defendant on or before March 31st, 1888,

the plaintiff should be at liberty to give notice of the order of May 14th, 1887, and of that order in the form prescribed in the second schedule, to each of the debtors mentioned in the said first part and to collect and recover such debts in his own name. On February 13th, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of December 20th, 1887, a notice requiring payment and stating that the defendant's firm were "closing up accounts with a former member," and that it was "necessary to collect all outstanding debts." On February 23rd, 1888, the defendant in the action committed an act of bankruptcy upon which a petition was presented against him. On April 4th, 1888, the plaintiff, without knowledge of the act of bankruptcy or of the petition, sent to the debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver and the assignment. In May, 1888, the debtor was adjudicated bankrupt and the trustee claimed the scheduled debts.

*Held*: That the order appointing the receiver did not constitute the plaintiff a secured creditor : that the order of December 20th, 1887, transferred the book debts to the plaintiff but left them in the order and disposition of the bankrupt without notice : and that although the debts in the first part of the schedule were taken out of the order and disposition clause by the notice of April 4th, 1888, those contained in the other three parts of the schedule were in the order and disposition of the bankrupt at the time of the bankruptcy, the notice sent out by the receiver on February 13th, 1888, being insufficient. *In re Tillett, Ex parte Kingscote* . . . . . p. 70

PARTNERS—*Bankruptcy of.*]—In 1885 an agreement was made in London by which the respondent was to act for the debtors' firm as agent in Australia, but in 1886 he was dismissed from service and commenced an action against the firm in the Australian Courts for breach of the agreement. In 1887 the senior partner of the firm died and his son was taken into the business, but in 1889 a receiving order was made against the firm and the official receiver applied for an injunction to restrain the respondent from proceeding with his action.

*Held*: That as the Court was not satisfied that the rights of the respondent as plaintiff in the action would not be prejudiced or that expense would be saved the application must be refused. *In re Spalding & Hodge, Ex parte the Chief Official Receiver* . . . . . p. 163

PARTNERSHIP ACTION.]—(1) During the pendency of a partnership action between the debtors they were adjudicated bankrupt, and an order by consent was subsequently made by which the receiver in the action was directed to pass his accounts and to tax the costs, and that such costs when taxed be paid by the receiver out of the balance in his hands and the residue of the balance be paid to the trustee in the bankruptcy.

*Held*: That on the true construction of the order the receiver was right in paying to the solicitors of the plaintiff and the defendant in the action their taxed costs ; and in handing over the balance after such payment to the trustee in the bankruptcy.

But that such an order could not be binding on the trustee except in so far as he had made it binding on him by assenting to it.

Where after the commencement of a partnership action a receiving order is made against the parties, the solicitors in the action have no right to obtain behind the back of the trustee in the bankruptcy a consent order by means of which their costs will be paid out of the partnership assets.

In order to obtain such an order the trustee must be made a party to the application and if that is not done he is at liberty to apply to the Court of Bankruptcy for a declaration that the consent order is of no worth as against him. *In re Chantry & Brewster, Ex parte Peace* . . . . . p. 33

(2) Where in a partnership action in the Chancery Division a receiver has been properly appointed, but a receiving order having been subsequently made against the partners, the proceedings are transferred to the Bankruptcy Court, the Court acting on the principles of the Court of Chancery, will give a charge on the funds collected by the receiver in favour of the solicitor of the plaintiff in the action. But if it appears that at the time of instituting the action the solicitor was well aware that the partnership was insolvent and nevertheless brings the action and obtains the order for the appointment of a receiver when proceedings might be taken in bankruptcy, for the purpose of making costs, the Court will hold that such costs were not *bond fide* incurred in preserving the assets of the partnership, and will in such case refuse to make a charging order. *In re Nicholas & Paine, Ex parte Lovett & Co.* . . . . . p. 173

**PETITION.—Costs of.]**—Objection having been taken by the debtors to a bankruptcy petition presented against them on the ground that the petitioning creditor had assented to the deed of assignment which he relied upon as the act of bankruptcy, the hearing of such petition was, after certain evidence had been taken, adjourned *sine die* with liberty to apply.

Shortly afterwards a receiving order was made against the debtors on the petition of another creditor who had not assented to the deed, and the former petition was subsequently dismissed by the County Court registrar with costs.

*Held:* That although the registrar was right in refusing to allow the costs of the first petition to come out of the estate ; yet he was not justified under the circumstances in directing the creditor to pay the costs of the bankrupts : and that the proper order to be made would be that the petition be dismissed without costs. *In re Smith & Sons, Ex parte Rook* . . . . . p. 30

**Presented in wrong Court.]**—Where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition and to make a receiving order.

The mere fact of a bankruptcy petition being presented in the wrong Court by inadvertence will not invalidate the jurisdiction, and by section 97 of the Bankruptcy Act, 1883, the proceedings can be removed into the proper Court. *In re French, Ex parte French* . . . . . p. 258

**POST—Notice of Appeal sent by.]**—An appeal is brought by serving the notice on the respondent, which must be done within twenty-one days.

Where notice of appeal was posted on the last day allowed, but such notice did not reach the respondent until after the expiration of the twenty-one days, and a preliminary objection was taken that the appeal was out of time.

*Held*: That the objection must be allowed ; and that the Court would not give leave to extend the time, the practice being settled and no valid reason having been put forward why indulgence should be shown. *In re Faulconer, Ex parte Cochrane* . . . . . p. 206

PROOF.]—(1) After a receiving order had been made against the debtor judgment in favour of the plaintiff was given in an action brought by reason of material misrepresentations contained in the prospectus of a company whereby such plaintiff had been induced to accept debentures, and a proof was subsequently tendered against the estate of the debtor who was one of the directors of the company for the amount claimed.

*Held*: That the proof in question was rightly rejected by the trustee. *In re Giles, Ex parte Stone* . . . . . p. 158

(2) On July 8th, 1887, judgment was signed under Order XIV. in an action brought against the debtor to recover the sum of 520*l* alleged to be due for commissions executed and moneys paid on his behalf by the plaintiffs who carried on business as turf commission and betting agents. The judgment debt was not satisfied and a bankruptcy notice was subsequently issued against the debtor upon which he was adjudicated bankrupt, but a proof tendered by the plaintiffs in the action in respect of their debt was rejected by the official receiver as trustee, on the ground that the claim was founded on gaming transactions.

*Held*: That the fact that the judgment had been obtained was not conclusive ; and that the plaintiffs having failed to satisfy the Court that the debt arose from commission business, the decision of the official receiver must be affirmed. *In re Lopes, Ex parte Hardaway & Topping* . . . . . p. 245

PROPERTY—*Acquired by Undischarged Bankrupt*.]—The bankrupt before obtaining his discharge, carried on business unknown to his trustee and acquired property. This property was subsequently taken possession of by the trustee, and application was thereupon made by a person who alleged that he had advanced certain moneys to the bankrupt for the purpose of improving such after-acquired property that he might be paid out of it, while the bankrupt himself applied for an indemnity.

*Held*: That as a matter of fact there was no proof that the alleged creditor had ever advanced any sums to the bankrupt which had not been repaid.

And further that in any case as the applicant knew that the bankrupt had not obtained his discharge, and that the property in respect of which he was dealing was the property of the creditors, he had no equity.

Also that the bankrupt was not entitled to claim an indemnity, and that he had not acted as the agent of the trustee.

But *quere* whether there is a complete immunity of the trustee from all liability in respect of honest claims made in such case against the bankrupt. *In re Clark, Ex parte Kearley* . . . . . p. 42

*Right of Trustee to*.]—At the time of the bankruptcy there were at the chambers occupied by the bankrupt previous to his absconding certain pictures which were taken possession of by the landlord of the chambers who refused to

give them up to the trustee without proof of title, or unless an indemnity were given to him against any risk of an action for conversion in the event of the said pictures afterwards being claimed by third parties.

*Held*: That the contention of the landlord that before giving up the pictures he was entitled to call on the trustee to prove his title could not be allowed; and that the pictures having been in the possession of the bankrupt, the rights which he had in them devolved upon his trustee. *In re Bryant, Ex parte Gordon* p. 262

**PUBLIC EXAMINATION.]**—The Court has no jurisdiction under the Bankruptcy Act, 1883, to direct service on a debtor who is out of the jurisdiction of an order requiring him to attend for public examination. *In re Wendt, Ex parte The Official Receiver* . . . . . p. 127

**“ RECEIPT AND INVENTORY.” ]**—See *Bill of Sale*.

**RECEIVER.]**—See *Creditor—Execution—Costs*.

**RECEIVING ORDER—*Application to Rescind.* ]**—Where a receiving order has been made against a debtor and where there has not been payment of the debts in full and no suggestion is raised that such receiving order has been wrongly made, it is not sufficient in order to obtain a rescission of the receiving order for the debtor to collect the assents of his creditors to such rescission.

In order to move the Court to interfere in the matter the debtor ought to bring before it some clear ground for thinking that what is put forward other than a payment of the debts in full is a *bond fide* proposal which it will be in the interests of the creditors to uphold, and also one which is not detrimental to the public at large.

Such proposal must take the form of some scheme of arrangement, and, if that arrangement is not in substance the same as an arrangement which would satisfy the requirements of section 18 of the Bankruptcy Act, 1883, the fact of the debtor not proceeding under that section must be carefully considered by the Court before it allows a receiving order to be annulled; although an absolute rule has not been laid down that where the scheme of arrangement which is proposed is equivalent to a scheme under section 18, and can be accepted with perfect safety, the Court is bound at once to reject the proposal because all the formalities of section 18 have not been fulfilled.

The question whether a receiving order ought to be set aside or not is a matter of discretion in each particular case, and the Court of Appeal will not interfere in such a matter unless it is clearly of opinion on all the facts that the discretion as exercised was wrong. *In re Hester, Ex parte Hester* . . . . . p. 85

***Appeal Against.]***—(1) Where on an appeal from a receiving order it was stated that the petitioning creditor had been settled with, and with his assent, the debtor applied that the receiving order might be set aside, the Court refused to rescind the receiving order and directed that the case should go back to the Registrar for his decision. *In re Ashbury, Ex parte Ashbury* . . . . . p. 256

(2) Where a bankruptcy petition is presented by a creditor founded on the failure of the debtor to pay a judgment debt and an appeal is pending from such judgment it is a matter of discretion for the Registrar whether he will stay the proceedings or not, and the judgment debtor cannot in such case under section 7 subsection (4) of the Bankruptcy Act, 1883, claim a stay of proceedings as of right.

Where the Registrar in the exercise of his discretion refuses to stay the proceedings the Court of Appeal will not interfere with his decision unless it is clearly of opinion that the discretion was wrongly exercised. *In re French, Ex parte French* . . . . . p. 258

*Where only one Creditor.*]—The fact that the debtor has no other creditor in England is not necessarily a sufficient reason for refusing to make a receiving order ; it is not the duty of the petitioning creditor to prove the existence of other creditors ; and the mere fact that a debtor states he has only one creditor is not sufficient to cause the Registrar to dismiss the petition. *In re Heecguard, Ex parte Heecguard* . . . . . p. 282

*Notice to Official Receiver.*]—Where a debtor appeals from a receiving order which has been made against him notice of the appeal must in all cases be served on the Official Receiver.

But the Official Receiver is not required in all cases to appear at the hearing of the appeal by reason of the fact that notice has been served on him ; and unless the Official Receiver has some substantial information to give to the Court he ought not to appear at such hearing. *In re Webber, Ex parte Webber* . p. 313

REMUNERATION.]—See *Solicitor—Trustee*.

REVIEW.]—(1) An application made to the Court by a bankrupt for a review of an order refusing him his discharge ought not to be an *ex parte* application and it ought to be made and decided upon by the court before the facts of the case are gone into. On such application it is necessary that the bankrupt should make out a *prima facie* case which the other side are not required to answer until the Court has determined whether or not it will grant an order for review. When the Court comes to the conclusion that there are *prima facie* grounds which lead it to think that the former order ought to be reviewed, if the other side are dissatisfied their proper course is to appeal at once from the determination to review the order and not to wait until the order has been brought up for review before appealing. *In re Lloyd, Ex parte Lloyd* . . . . . p. 297

(2) On March 18th, 1886, an order was made in the County Court that the discharge of the bankrupt be suspended for three years and that it be then granted subject to the condition that he should consent to judgment being entered against him for the balance of the provable debts under section 28 subsection (6) of the Bankruptcy Act, 1883. On June 20th, 1889, application was made by the bankrupt to the County Court to review, rescind, or vary its former order by expunging the conditions on which it had been granted, on the ground that the Court had no power under section 28 to make a conditional order of discharge and also suspend the order. The County Court judge refused the

application, being doubtful whether under section 104 subsection (1) of the Bankruptcy Act, 1883, he had authority to deal with it.

*Held:* That the County Court judge had power to rehear the case, and that it must be remitted back to him for that purpose, and to make such order as he might think fit under all the circumstances. *In re Tregaskis, Ex parte Tregaskis* p. 309

**SCHEME OF ARRANGEMENT.]**—Where a receiving order has been made against a debtor and where there has not been payment of the debts in full and no suggestion is raised that such receiving order has been wrongly made, it is not sufficient in order to obtain a rescission of the receiving order for the debtor to collect the assets of his creditors to such rescission.

In order to move the Court to interfere in the matter the debtor ought to bring before it some clear ground for thinking that what is put forward other than a payment of the debts in full is a *bond fide* proposal which it will be in the interests of the creditors to uphold, and also one which is not detrimental to the public at large.

Such proposal must take the form of some scheme of arrangement, and, if that arrangement is not in substance the same as an arrangement which would satisfy the requirements of section 18 of the Bankruptcy Act, 1883, the fact of the debtor not proceeding under that section must be carefully considered by the Court before it allows a receiving order to be annulled; although an absolute rule has not been laid down that where the scheme of arrangement which is proposed is equivalent to a scheme under section 18, and can be accepted with perfect safety, the Court is bound at once to reject the proposal because all the formalities of section 18 have not been fulfilled.

The question whether a receiving order ought to be set aside or not is a matter of discretion in each particular case, and the Court of Appeal will not interfere in such a matter unless it is clearly of opinion on all the facts that the discretion as exercised was wrong. *In re Hester, Ex parte Hester* . . . . p. 85

**SECURED CREDITOR.]**—See *Creditor*.

**SHERIFF.]**—See *Execution—Bill of Sale*.

**SOLICITOR — Costs of.]**—(1) Rule 112 of the Bankruptcy Rules, 1886, by which a solicitor's costs in all proceedings under the Act in which costs are payable out of the estate are reduced to three-fifths of the ordinary allowance where the assets do not exceed 300*l.*, does not apply to costs of conveyancing matters, the solicitor's remuneration in such case being regulated by the General Order under the Solicitor's Remuneration Act, 1881, in accordance with Rule 2 of the General Regulations contained in the Appendix to the said Rules. *In re Parfitt, Ex parte the Board of Trade* . . . . p. 166

(2) Where a solicitor was ordered under Rule 112 of the Bankruptcy Rules, 1886, to repay to the trustee, by reason of the gross proceeds of the assets not exceeding 300*l.*, a certain sum paid to him as costs on the higher scale, together with the costs of the order, and the solicitor repaid the amount so received by him in excess but failed to pay the costs, and application was made for his

committal, the Court in the absence of authority refused to make an order to commit, being doubtful whether the respondent had been ordered to pay the money in respect of which a committal order was asked for in his character of solicitor. *In re Apelt, Ex parte Byrne* . . . . . p. 102

(3) Where a solicitor is appointed trustee in a bankruptcy his remuneration must be in the nature of a commission or percentage ; and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings.

At the first meeting of creditors a solicitor was appointed trustee in the bankruptcy at a remuneration to be fixed by the committee of inspection and a resolution was subsequently passed by such committee "that the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy." Under this resolution the trustee did the legal work arising in connection with the estate and carried in a bill of costs therefor which was allowed by the taxing master.

*Held* : That the taxing master was wrong in allowing the costs ; that the resolution passed by the committee of inspection was of no effect and the result was that no remuneration had been voted to the trustee, whose proper course was to send in his bill for taxation under section 72, sub-section (4) of the Bankruptcy Act, 1883, as if no remuneration had been voted. *In re Wayman, Ex parte the Board of Trade* . . . . . p. 272

(4) Where in a partnership action in the Chancery Division a receiver has been properly appointed, but a receiving order having been subsequently made against the partners, the proceedings are transferred to the Bankruptcy Court, the Court acting on the principles of the Court of Chancery, will give a charge on the funds collected by the receiver in favour of the solicitor of the plaintiff in the action. But if it appears that at the time of instituting the action the solicitor was well aware that the partnership was insolvent and nevertheless brings the action and obtains the order for the appointment of a receiver when proceedings might be taken in bankruptcy, for the purpose of making costs, the Court will hold that such costs were not *bond fide* incurred in preserving the assets of the partnership, and will in such case refuse to make a charging order. *In re Nicholas & Paine, Ex parte Lovett & Co.* . . . . . p. 173

(5) During the pendency of a partnership action between the debtors they were adjudicated bankrupt, and an order by consent was subsequently made by which the receiver in the action was directed to pass his accounts and to tax the costs, and that such costs when taxed be paid by the receiver out of the balance in his hands, and the residue of the balance be paid to the trustee in the bankruptcy.

*Held* : That on the true construction of the order the receiver was right in paying to the solicitors of the plaintiff and defendant in the action their taxed costs ; and in handing over the balance after such payment to the trustee in the bankruptcy.

But that such an order could not be binding on the trustee, except in so far as he had made it binding on him by assenting to it.

Where after the commencement of a partnership action a receiving order is made against the parties, the solicitors in the action have no right to obtain behind the back of the trustee in the bankruptcy a consent order by means of which their costs will be paid out of the partnership assets.

In order to obtain such an order the trustee must be made a party to the application, and if that is not done he is at liberty to apply to the Court of Bankruptcy for a declaration that the consent order is of no worth as against him. *In re Chantry & Breuer*, *Ex parte Peace* . . . . . p. 33

(6) On August 1st, 1888, the debtor gave to his solicitor, who had acted for him in previous litigation with the petitioning creditor, a charge on his house for costs, the solicitor at the same time agreeing to obtain for the debtor an advance of 250*l.* on such charge. On August 31st, 1888, a receiving order was made against the debtor, the act of bankruptcy alleged being the departure of the said debtor from his dwelling-house, with intent to defeat his creditors on July 31st, 1888. The debtor was adjudicated bankrupt, and the trustee sought to set aside the charge as being a fraudulent preference of the solicitor and given to him with the knowledge of the act of bankruptcy.

*Held*: (1) That the object of the debtor being to benefit himself by getting the 250*l.*, and not to benefit the solicitor, the transaction was not a fraudulent preference.

(2) That an allegation against a solicitor of entering into an arrangement of this nature, with knowledge of a previous act of bankruptcy, was one which required to be supported by the strictest proof; and that there was nothing in the present case to lead the Court to come to any such conclusion. *In re Arnott, Ex parte Barnard* . . . . . p. 215

**STAY OF PROCEEDINGS.]**—Where a bankruptcy petition is presented by a creditor founded on the failure of the debtor to pay a judgment debt, and an appeal is pending from such judgment, it is a matter of discretion for the registrar whether he will stay the proceedings or not, and the judgment debtor cannot in such case, under section 7, sub-section (4), of the Bankruptcy Act, 1883, claim a stay of proceedings as of right.

Where the registrar in the exercise of his discretion refuses to stay the proceedings, the Court of Appeal will not interfere with his decision unless it is clearly of opinion that the discretion was wrongly exercised. *In re French, Ex parte French* . . . . . p. 258

**TIME.]**—See *Appeal*.

**TRADE MACHINERY.]**—On August 29th, 1887, certain leasehold premises together with the fixed machinery and effects in and upon the said premises, were purchased by the bankrupt out of money provided by the applicant upon the understanding and agreement that he should hold the said property, plant, and effects as trustee for and on behalf of the applicant until such time as he should require an assignment of the same. On February 7th, 1888, the bankrupt deposited with the applicant the deeds and documents of title relating to

the said property together with a memorandum whereby, after reciting the terms of the purchase, he undertook upon demand to execute in favour of the applicant an assignment of the property either by way of mortgage for securing the repayment of the money advanced, or absolutely, as the applicants should elect ; and until such election was exercised he deposited with the applicant the lease and documents of title relating to the property as an equitable mortgage. In July, 1888, a receiving order was made against the bankrupt, and the plant, machinery, and effects upon the premises were subsequently claimed by the official receiver on the ground that the memorandum was an assignment of trade machinery and required to be registered as a bill of sale.

*Held :* That the document in question was not an assignment of the trade machinery and was not a bill of sale within the meaning of the Acts, and that the mortgagee was entitled to the property claimed. *In re Lusty, Ex parte Lusty* . . . . . p. 18

**TRUSTEE—Objection to by Board of Trade.]**—Where an objection is taken by the Board of Trade under section 21 of the Bankruptcy Act, 1883, to a trustee appointed by the creditors on the ground that “his connection with or relation to the estate of the bankrupt makes it difficult for him to act with impartiality in the interest of the creditors generally,” and it is alleged that the person so appointed has dealt with the estate of the bankrupt with notice of an available act of bankruptcy, and that he is accountable to the trustee in the bankruptcy in respect of his dealings with the estate, it is not essential that the Board of Trade should establish any absolute act of bankruptcy or personal liability of such person to the estate, but it is sufficient to show that there is a necessity to have an account taken which may or may not disclose personal liability. And it would seem that it is not requisite on the Board of Trade to take such account and judge of the liability, but that is for the trustee to take it in the bankruptcy.

Where shortly before the bankruptcy an accountant at the request of the principal creditor of the debtor took possession of the debtor's estate for the purpose of controlling his receipts and expenditure, the account subsequently rendered in respect of such dealings with the estate showing a balance of 26s., which the accountant claimed to retain as charges which he might properly make against the bankrupt.

*Held :* That the Board of Trade was justified in objecting to the appointment by the creditors of such accountant as trustee in the bankruptcy ; and that the objection must be sustained. *In re Stovold, Ex parte the Board of Trade* . . . p. 7

**Right of Board of Trade to demand Account from.]**—The fact that there is no evidence of any moneys remaining in the hands of a trustee who is ordered by the Board of Trade to furnish an account under section 162 of the Bankruptcy Act, 1883, will not justify such trustee in refusing to comply with the requirements of the order so made.

Thus where a scheme of arrangement under a liquidation petition was accepted by the creditors by which 20s. in the pound was paid, and the debtor obtained his discharge, but the trustee after his release was required by the Board of Trade to furnish a proper account.

*Held* : That the Board of Trade were entitled to demand that an account should be rendered ; and that the trustee must comply with the order. *In re Calderwood, Ex parte the Board of Trade* . . . . . p. 104

*Committal of.]*—(1) Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys, together with a further sum as interest at the rate of 20 per cent charged under section 74, sub-section (6) of the Bankruptcy Act, 1883, and the Board of Trade applied for an order of committal.

*Held* : That an immediate order of committal must be made in respect of the principal sum ; but that such order would not issue for a week and not go out at all if within that time the trustee should pay into the Bankruptcy Estates Account the amount due, together with the costs of the motion.

That an order would be made directing the trustee to comply with the order of the Board of Trade requiring him to pay the sum charged as interest within a fortnight.

Where a trustee who retains moneys belonging to the estate has been removed from office, interest may be charged during the time he so retains the moneys in his hands and not only up to the time of his removal. *In re Tatum, Ex parte the Board of Trade* . . . . . p. 107

(2) Where an order was made against a trustee who had failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate, ordering him to be committed to prison in the event of his not paying the amount specified within a week, and the terms of the order not being complied with, a warrant was issued against the trustee, but the amount in question was subsequently paid by a guarantee society, and the trustee applied that the order of committal might be rescinded.

*Held* : That the money having been paid there was no longer any default on the part of the trustee ; and that the order for committal must be discharged. *In re Tatum, Ex parte Harker* . . . . . p. 179

*Costs of.]*—Although a trustee in bankruptcy has a right to bring motions and initiate proceedings which, if properly brought, will be paid for out of the assets of the estate, if he so acts as to recklessly institute litigation and causes matters to be brought before the Court where by proper management litigation might have been avoided, the costs of such proceedings will not be allowed out of the estate, but the trustee will have to pay the costs out of his own pocket. *In re Bryant, Ex parte Gordon* . . . . . p. 262

*Appointment of Solicitor as.]*—Where a solicitor is appointed trustee in a bankruptcy, his remuneration must be in the nature of a commission or percentage ; and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings.

At the first meeting of creditors a solicitor was appointed trustee in the bankruptcy at a remuneration to be fixed by the committee of inspection, and a

resolution was subsequently passed by such committee "that the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy." Under this resolution the trustee did the legal work arising in connection with the estate and carried in a bill of costs therefor, which was allowed by the taxing-master.

*Held*: That the taxing-master was wrong in allowing the costs ; that the resolution passed by the committee of inspection was of no effect, and the result was that no remuneration had been voted to the trustee, whose proper course was to send in his bill for taxation under section 72, sub-section (4) of the Bankruptcy Act, 1883, as if no remuneration had been voted. *In re Wayman, Ex parte The Board of Trade* . . . . . p. 272

*Compromise by.]*—A compromise entered into by the trustee in the bankruptcy in respect of a claim made against the bankrupt's estate was approved by a majority of the committee of inspection, but at a subsequent general meeting of the creditors a resolution was passed refusing to accept the compromise. The trustee applied to the Court for leave to carry out the compromise notwithstanding this resolution.

*Held*: That the resolution refusing to approve the compromise having been passed by the creditors *bond fide*, and with a view to their own interests after due consideration of the matter in question, the Court would not overrule their decision ; and that the compromise must be abandoned. *In re Ridgway, Ex parte Hurlbatt* . . . . . p. 277

**VESTING ORDER.]**—(1) Section 55, sub-section (6) of the Bankruptcy Act, 1883, provides that "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid or a trustee for him, and on such terms as the Court thinks just ; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose."

*Held*: That on application under the section it is in the discretion of the Court what persons from among those claiming interest or under liability should be made respondents to the application ; and if at the hearing the Court is of opinion that any of such persons who have not been served with notice ought to have an opportunity of being heard it may direct service to be made.

Where the property disclaimed is of a leasehold nature it will always be prudent until the question raised and not settled in *In re Finley, Ex parte Hanbury* (see *ante*, Vol. 5, p. 248 ; L. R. 21 Q. B. D. 475) has been decided, that notice of the application should be served on the lessor. *In re Morgan, Ex parte Morgan* . . . . . p. 57

(2) Where application is made by a trustee in bankruptcy for leave to dis-

claim a lease the lessor is entitled as soon as he is served with notice of the trustee's application to serve notice of motion for a vesting order upon the parties interested, and he need not wait until leave to disclaim has been actually given; but in such case the lessor will run the risk of having his motion dismissed with costs if leave to disclaim is refused, or if it should prove that notwithstanding leave to disclaim being given the lessor is not entitled to a vesting order.

Whether an affidavit or other evidence is required in support of the notice of motion by the lessor is a matter for the judge whose duty it is to see that the respondents are not taken at a disadvantage by reason of their ignorance of the terms of the option which is offered to them.

As a general rule if the lessor succeeds in bringing himself within the provisions of section 55, sub-section (6), of the Bankruptcy Act, 1883, the Court after giving leave to disclaim ought to make a vesting order on his application, but such rule may be subject to exceptions. *In re Britton* . . . . p. 130

**WEDDING PRESENTS.**]—Wedding presents given to a woman on occasion of her marriage are her separate property, and in the event of the subsequent bankruptcy of the husband they cannot be claimed by his trustee.

Prior to the marriage in 1882 an antenuptial settlement was executed by which it was agreed that if at any time during the intended coverture the wife, or the husband in her right should "by gift, will, settlement, succession, transmission, or otherwise" become beneficially entitled to any personal estate "except plate, trinkets, furniture and jewels" which were to be considered as property settled to the separate use of the wife, such property should come into settlement.

*Held:* That the covenant in question included gifts to the wife before the marriage, and was also sufficient to cover the gifts given to her on her marriage; and that the words were not confined so as to apply only to property which might be acquired by the modes mentioned at some future time. *In re Jamieson, Ex parte Pannell* . . . . p. 24

**WILL.**]—A testator by his will directed his trustees to pay out of the trust funds a sum of 250*l.* a year to his son during the life of the testator's wife, and after her decease to divide the said trust funds into four equal parts and to pay the income of one such fourth part to his said son during his life and after his decease in trust for his children as therein mentioned. The will also contained the following proviso:—"Provided also and I hereby declare that my said son G. C. Harvey shall not have power to alienate, charge, encumber or dispose of the said sum of 250*l.* bequeathed to him during the life of my said wife, or the income whether original or accruing to which he will be entitled after her decease: and in the event of his alienating, charging, encumbering or disposing of the same or any part thereof, my said trustees or trustee shall cease to pay him either the said sum of 250*l.* per annum or the income of the share whether original or accruing as aforesaid, and such last-mentioned income shall accumulate during the life of the said G. C. Harvey, and the accumulations thereof shall be held by my said trustee or trustees in trust for the person or persons who shall be entitled to the share of the said G. C. Harvey at his decease." After

the death of the testator the son was adjudicated a bankrupt on a creditor's petition, and the trustee in the bankruptcy claimed the benefits given to the bankrupt under his father's will.

*Held:* That the bankruptcy did not operate as a forfeiture; and that the annuities remained payable and must be handed over to the trustee. *In re Harvey, Ex parte Pixley* . . . . . p. 95

WITNESS.]—Where on application by the trustee an order is made under section 27 of the Bankruptcy Act, 1883, summoning a person to attend the Court to be examined respecting the debtor, his dealings or property, the Court has power in the event of the witness being prevented by illness from attending before it, to direct such examination to be conducted at the witness's own residence before an officer of the Court or some other person appointed for the purpose. *In re Bradbrook, Ex parte Hawkins* . . . . . p. 188

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